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Supreme Court, U.S.
FILED

961612 APR 4 1997

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NO. _____

In The
Supreme Court of The United States
October Term 1996

SARA J. HARPER

Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL,
THE SUPREME COURT OF OHIO, ET AL.,

Respondents.

Petition For A Writ of Certiorari
From The Supreme Court of
The State of Ohio

PETITION FOR WRIT OF CERTIORARI

Sara J. Harper
Mark A. McClain, Of Counsel
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136 pp

QUESTION PRESENTED FOR REVIEW

Whether the constitutional rights to freedom of speech and due process of law allow a state supreme court to punish a judicial candidate for statements made during a political campaign when the statements made were not false.

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STATEMENT OF JURISDICTION

The Ohio Supreme Court issued a December 5, 1996 written opinion (App. 62) and subsequently a December 26, 1996 Order (App. 18) imposing a public reprimand against Petitioner.

Upon motion by Petitioner, this Court granted a 30 day leave until April 4, 1997, for which to file a Petition for Writ of Certiorari.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. section 1257 which grants this Honorable Court the power to review by writ of certiorari final judgments rendered by the highest court of a state when the validity of a state statute is challenged on the ground that it is repugnant to the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution:

> Congress shall make no law... abridging the freedom of speech, or of the press....

The Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

Ohio Code of Judicial Conduct (Effective December 20, 1973, Including Amendments Received through July 15, 1994)(See App. 25).

STATEMENT OF THE CASE

This petition seeks review of a December 5, 1996 Supreme Court of Ohio decision (App. 62) and December 26, 1996 Order (App. 18) that imposed a public reprimand against Petitioner Judge Sara J. Harper. The public reprimand was imposed against the sitting state court of appeals judge due to the content of a television commercial that she approved for broadcast during the 1994 Supreme Court of Ohio election. The commercial contained true information about the source of campaign funds raised by the incumbent opponent, but was found to have violated canons of judicial conduct due to alleged "implied" untruths (App. 108).

On June 5, the 1995 The Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio filed a Complaint and Certificate against Petitioner alleging that she violated Canons 1, 2A, 7(B)1(a) and (c), and 7(C)9. (App. 21, Complaint; App. 25, Code of Judicial Conduct, Including Amendments Received through July 15, 1994). Petitioner responded to the Complaint and Certificate denying any violations and alleging that her speech was protected under the First Amendment of the United

States Constitution. Petitioner further alleged that the canons of judicial conduct that Petitioner allegedly violated were vague and overbroad and constituted a violation of her due process rights under the Fourteenth Amendment of the United States Constitution.

In its December 5, 1996 opinion, the Ohio Supreme Court determined that no constitutional rights were violated (App. 86-111).

The State of Ohio's Code of Judicial Conduct (hereinafter referred to as "Ohio Code") became effective on December 20, 1973, and was adopted from the American Bar Association's 1972 model Code of Judicial Conduct (hereinafter referred to as "Model Code"). Each canon and accompanying text of the 1972 Model Code and the 1973 Ohio Code uses the word "should," in describing a judge's obligations under the canons. Within the context of those versions of the Code, the Preface interpreted "should" as mandatory:

> This code, consisting of statements of norms denominated canons, the accompanying text setting forth specific rules, and

> the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated.

However, the Code of Judicial Conduct in effect at the time that the commercial was aired was an amended version of the 1973 Code. The Code had been amended to introduce the word "shall" in describing some duties. Petitioner was charged with violations of canons that used both "should" and "shall." Petitioner responded to the charges by claiming various defenses, among them were that the canons that she was alleged to have violated are flagrantly and patently facially overbroad and vague, and are unconstitutional as applied.

On March 5, 1996 the members of a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio recommended to the Board that all charges against Petitioner be dismissed:

> [T]he panel does not believe, in the circumstances of this case, where clear and convincing evidence of the falsity of the television ad is missing, that the television ad is so egregious as to warrant a formal sanction under the broadly written general Canons governing judicial conduct."

(App. 13, June 14, 1996 Amended Findings

of Fact, Conclusions of Law, And Recommendation of The Board of Commissioners On Grievances And Discipline Of The Supreme Court of Ohio, Case No. 95-38).

In spite of the recommendations of the panel, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio recommended to the Ohio Supreme Court that Petitioner be publicly reprimanded for violations of Canon 7B(1)(a) and Canon 2(A).

Canon 2A states:

> A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

Canon 7B, entitled "Campaign Conduct", states:

> (1) An incumbent judge, or a candidate for judicial office:
> (a) should maintain the dignity appropriate to judicial office;

On December 5, 1996, the Ohio Supreme Court issued its opinion accepting the recommendation of the Board, and issuing a public reprimand against Petitioner for violating Canon 2(A) and Canon 7B(1)(a). The court determined that even though the campaign funding allegations were literally true,

various inferences arose out of the wording of the commercial, and the inferences were not true. The court therefore issued its Order of reprimand on December 26, 1996 (App. 18)

REASONS FOR ALLOWANCE OF WRIT

This Court should accept this case for consideration because the issues presented herein are of great constitutional import, great general interest, and are ones for which guidance from this Honorable Court is sorely needed. The issue of whether a state can restrict the First Amendment free speech rights of a judicial candidate based not on the truthfulness of the words, but on the an unstated alleged implication, has not been addressed by this Court.

The granting of the writ in this case would be particularly helpful to defining First Amendment free speech and due process rights. The canons of judicial conduct at issue in this case are ones taken directly from the ABA Model Code, which is in wide use throughout the various states. Further, the context in which the speech at issue was made, addressing the issue of campaign financing of judicial campaigns, shows that this case is timely and ripe for consideration. Where political speech is at issue, disciplinary rules are subject to exacting scrutiny under the First Amendment. In re Primus, 460 U.S. 412, 98 S.Ct. 1893 (1958).

A. UNCONSTITUTIONAL AS APPLIED - THE DIFFERENCE BETWEEN SHALL AND SHOULD

As applied in this case, Canons 2(A) and 7(B)1)(a) are unconstitutional as applied to truthful speech because The

Supreme Court of Ohio fails to use the words according to their reasonable and ordinary definition. Such a use cannot put Petitioner on notice that she has a mandatory obligation under the canons.

Within the context of the Ohio Code, the distinction between the words "shall" and "should" is consistent with the ordinary meanings of the words, and as the words are used in the ABA Model Code. "Shall" means mandate. "Should" means hortatory. It is widely accepted that word use in a statute should be consistent with the word's meaning so as not to confuse the reader. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991).

By initially adopting the language of the American Bar Association's 1972 Model Code, and later amending the language of the Ohio Code piecemeal, the Supreme Court of Ohio created judicial canons that create different levels of judicial accountability. With respect to canons 2A and 7(B)1(a), the text of the Ohio Code indicate that the language is aspirational and therefore the canons cannot be used to prosecute.

Originally, the 1973 Ohio Code mirrored the 1972 ABA Model Code. In those versions, the word "should" was interpreted to mean that everywhere the word was used, the duties outlined in the various canons were mandatory, and a judge was subject to disciplinary prosecution for a failure to uphold those duties. In both the 1972 Model Code and

the subsequent 1973 Ohio Code, the word "should" was the only word used when describing a duty. Otherwise, the word "may" was used to indicate that a judge was permitted to engage in certain activities.

However, in 1990 the ABA amended the Model Code to reduce confusion caused by the 1972 Model Code's singular use of the word "should" as a mandate. This was necessary because the word commonly expresses mere appropriateness as opposed to a mandate. The 1990 Model Code included a Preamble which clearly differentiated between the words "shall" and "should:"

> When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

The 1990 Model Code's Preamble language was used to "avoid the misunderstanding that had at times occurred in the past with the use of the term 'should' in the 1972 Code to express mandatory standards." L. Milord, The Development of the ABA Judicial Code, American Bar Association 1992, at 8.

After the 1973 Ohio Code was implemented, the Supreme Court of Ohio amended its code. However, instead of amending consistent with the previous use of the word "should," it added the use of the word "shall" along with the word "should" when describing the various duties and aspirations. (App. 37, Special Division[s] (C) [and D] of Canon 3 of the Code of Judicial Conduct for the Members of the Supreme Court of Ohio; App. 56, Canon 7C].

The amended Preface of the Ohio Code does not indicate that every canon and text establish mandatory standards, the violation of which subjects a judge to prosecution. Instead, the Preface states that "[t]he canons and text establish mandatory standards unless indicated otherwise." (App. 25). Therefore, the words of the canons distinguish what is mandatory from what is not.

Consistent with the Preface, the canons use words that indicate varying degrees of accountability. The canons and accompanying text contain the auxiliary verbs "shall," "must", "should," and "may," which span the range from mandatory to permissive. Accordingly, and consistent with the Preface, the choice of auxiliary verb indicates which sections constitute a mandate and which do not.

Whereas no one will dispute that the verb "may" is permissive, it is also undisputed that the verb "shall" indicates a mandate:

> **shall. A.** In Legislation. This overworked auxiliary verb invariably denotes an imperative rather than futurity when it appears in DRAFTING. Pitfalls await especially the statute drafter who is not familiar with some of the niceties of this word, however.
>
> 1. And **may**. The word **shall** ordinarily connotes language of command. [Cites omitted]. **May** is permissive; it merely states what is allowed.

B. Garner, A Dictionary of Modern Legal Usage 502 (1987).

Consistent with these definitions, the word "shall" in the Ohio Code indicate "mandatory." The word "should," however, indicates an obligation less forceful than a mandate:

> **ought to; should. Ought** should be reserved for expressions of necessity, duty or obligation; **should**, the weaker word, expresses mere appropriateness, suitability, or fittingness.

B. Garner, A Dictionary of Modern Legal Usage, p. 396 (1987)].

Concomitantly, it is even more unreasonable to interchange two words with different meanings, "shall" and "should," and use them as if they convey the same meaning. For example, in the Ohio Code Canon 3 included sections C and D that apply to judges (App. 37).

"Special Divisions C and D" set a higher standard under the same circumstances for Ohio Supreme Court Justices. Section C(1) states that a judge "should" disqualify himself from a case under certain specified circumstances. Special Division C(1), applicable to justices only, includes some of the same circumstances under which a judge should consider disqualification, and sets a higher standard for justices, stating that a justice "shall" disqualify himself under the same and similar circumstances as included in Section C(1).

Another example of the difference between "shall" and "should" within the Ohio Code is apparent in comparing Special Division C(1) and Special Division C(2). Subsection C(1) imposes on justices a mandatory "shall" duty to disqualify themselves when impartiality may be questioned. However, Subsection C(2) imposes a lesser "should" standard when justices are urged to control the actions of immediate family members when those actions may affect the appearance of impartiality.

It is reasonable to apply the "shall" standard in Special Section C(1) because a justice can control her own actions and investments. The lesser "should" standard is reasonable in Special Section C(2) because a justice reasonably can only aspire to control the actions of family members.

In this case, contrary to the Supreme Court of Ohio's statement, the

Ohio Code uses both "shall" and "should." Canons 2A and 7B(1)(a) both use the auxiliary verb "should" instead of "shall." In context, the usage of "should" indicates that judges should aspire to act accordingly. Therefore, to prosecute Petitioner under a canon that is not mandatory infringes upon her constitutional right to free speech and her right to due process under the law.

The normal reasonable interpretation and plain meaning of the words of canons 2A and 7B(1)(a), consistent with the Preface of the Ohio Code, the Preface of the 1972 Model Code, the Preamble to the 1990 Model Code, and A Dictionary of Legal Usage, cited above, indicates that the word "should" as used in the Ohio Code is merely hortatory. Given the strict scrutiny standard to be followed when First Amendment rights are involved, this Court should accept this case for review.

B. THE CANONS ARE FACIALLY OVER-BROAD AND VAGUE.

The canons that Petitioner is charged with violating are facially overbroad and vague. As drafted, the canons reach a significant amount of constitutionally protected conduct and may cause persons to refrain from constitutionally protected speech or expression for fear of violating the overreaching canons. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-495 (1981); Leonardson v. City of East Lansing, 896 F.2d 190, 195 (6th Cir.

1990); United States v. Wunsch, 54 F.3d 579, 586 (9th Cir. 1995).

(1) OVERBROAD

A law is overbroad when a law may be clear, but it prohibits constitutionally protected conduct. Inasmuch as Canons 2A and 7B(1)(a) generally require that a judge must conduct herself in a manner that makes the judiciary look good, these canons patently and flagrantly inhibit First Amendment right, and are therefore unconstitutionally overbroad. Hoffman Estates, at 495. Requiring a judge to protect the integrity of the judiciary may prevent that person from making truthful statements that may be informative to the public such as in this case, yet harmful to the reputation of the judiciary.

The mere prohibition against making knowingly false statements are not unconstitutional. However, these canons as drafted also act to prevent the uttering of all statements which, though truthful, may not portray the judiciary or a particular judge in a favorable light. Such a prohibition is unconstitutional. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978); Standing Committee v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995).

It is an admirable goal to maintain public confidence in the judiciary by placing the judiciary in the best possible light. However, neither the

state's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the punishment of true statements. See, Landmark, at 841. This overbreadth is substantial and is patently and flagrantly violative of a speaker's right to due process of law.

(2) VAGUE

A law is void on its face if it is so vague that persons of common intelligence must guess at its meaning and differ as to its application. Leonardson, at 196. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The canons under which Petitioner was prosecuted is patently and flagrantly unconstitutional because they deny the speaker fair notice of the standard of conduct to which she is to be held accountable. These vague canons also leave the parameters of enforcement to the state's discretion and thereby invites arbitrary, discriminatory and overzealous enforcement.

Under the circumstances of this case, the loose usage of "shall" and "should," along with the vague language of "promoting public confidence" and "maintaining the dignity" of the judiciary make canons 2A, and 7B(1)(a) patently vague. The use of the word "should" gives no indication to the reader that the cited canons are anything but hortatory. Additionally, given the vague notions of promoting public

confidence in the integrity of the judiciary, the regulated would have no idea when comments pass from the permissible, to the permissible but frowned on, to the forbidden.

This claim is supported by the recommendation of the Disciplinary Board's own panel that recommended that all disciplinary charges against Petitioner be dismissed:

> [T]he panel does not believe, in the circumstances of this case, where clear and convincing evidence of the falsity of the television ad is missing, that the television ad is so egregious as to warrant a formal sanction under the broadly written general Canons governing judicial conduct."

(App. 13). These vague concepts can only call for subjective value judgments from enforcers when determining whether these canons have been violated, and leads to discriminatory enforcement of the canons:

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. Kolendar v. Lawson, 461 U.S. 352, 357-358, 361 (1983). The question is not whether discriminat ory enforcement occurred here. The question is whether the rule is so imprecise that discriminatory enforcement is a real possibility.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991); Leonardson, at 196, 198.

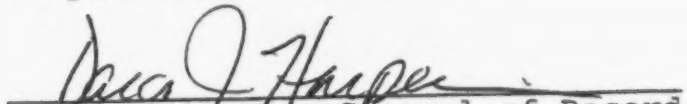
In United States v. Wunsch, 54 F.3d 579, 586 (9th Cir. 1995), the Ninth Circuit considered the constitutionality of a California code of professional conduct. The court held that a provision requiring attorneys to "abstain from all offensive personality" was unconstitutionally vague because it would be impossible to know what behavior was prohibited. The Court further found that given the vagueness of the language, discriminatory enforcement was a real possibility, and the language was likely to have a chilling effect on constitutionally protected speech.

Similarly, in this case, the vague language in the canons at issue can only have the same unconstitutional result in violation of Petitioner's right to freedom of speech and due process under the law.

CONCLUSION

For the reasons set forth above, the Court's standards for granting certiorari are satisfied and Petitioner therefore requests that her Petition be granted.

Respectfully submitted,



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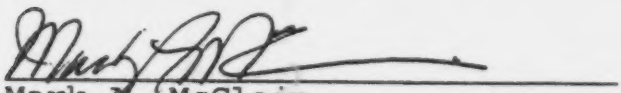
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Certiorari was sent by ordinary U. S. Mail this 4th day of April, 1997, to:

Betty Montgomery
Attorney General
for the State of Ohio
30 East Broad Street
17th Floor State Office Tower
Columbus, Ohio 43215-3428



Mark A. McClain

APPENDIX

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCE AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	)	Case No. 95-38
Complaint against:	)	
JUDGE SARA J. HARPER,	)	**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND RECOMMEND-ATIONS OF THE BOARD OF COMMIS SIONERS ON GRIEVANCES AND DISCI PLINE OF THE SUPREME COURT OF O H I O**
ATTORNEY REGISTRATION, 0023730	)	
Respondent,	)	
DISCIPLINARY COUNSEL,	)	
Relator	)	

On March 5, 1996, this matter came to be heard in Columbus, Ohio. The members of the panel from the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio were Dino Gianuglou, Esq., Larry Seward and Richard S. Milligan, Esq., chairman of the panel. None of the panel members resides in the appellate district in which Respondent practices and non served on the probable cause panel reviewing this matter.

The Respondent, Judge Sara J. Harper, was represented by Harold F. Craig, III and Alvin E. Matthews. Present for the hearing was the Respondent, Judge Sara J. Harper.

I. FINDINGS OF FACT

Sara J. Harper is a judge in the Ohio Court of Appeals for the Eighth Appellate District. On two different occasions Judge Harper has sat on the Cleveland Municipal Court. In 1976 and again in 1980, Judge Harper was a candidate for the Ohio Supreme Court. Judge Harper has also run on one occasion for Judge of the Cuyahoga County Domestic Relations Court. In 1994, she became a judicial candidate for the Ohio Supreme

Court running against Justice Alice Robie Resnick.

For the 1994 election, Judge Harper had set up her own campaign committee with her sister as chairperson. In addition, the Ohio Republican Party established a committee called "Supreme Court '94" to work for the election of two candidates for the Supreme Court, one of which was respondent. The funds available to Judge Harper's own campaign committee were limited. In the fall of 1994, the Republican Party "Supreme Court '94" Committee suggested to Judge Harper that it wanted to produce and air a campaign commercial featuring Judge Harper. In the fall, a camera crew came to Cleveland and filmed Judge Harper working in her office.

Nothing more of the campaign commercial was heard by Judge Harper until she was called to attend a meeting on October 31, 1994 in Columbus, Ohio. Present at the meeting were Judge George W. Trumbo (Respondent's husband), Robert Bennett (chairman of the Ohio Republican Party) and John Brown (director of "Supreme Court '94"). For the first time, Judge Harper viewed the television campaign commercial. According to Judge Harper, she expected to see footage from

the filming which took place in Cleveland earlier that fall. Instead, she was shown a commercial with the following audio:

> On Ohio's Supreme Court, on Justice has a problem--it's money. Most of Resnick's money comes from just one place: The plaintiffs' lawyers who sue, sue, sue -- over $300,000.00 just from them. This small group of suing lawyers wants Resnick, with her liberal rulings, to make it easier for them to collect millions in fees. It's time for a change to Judge Sara Harper -- recommended, endorsed, highly rated, 20 years as a judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.

None of the film taken earlier in October at her offices was used in the commercial. Instead, the video included a photograph of a check in the amount of $300,000.00 from "the law firm of Sue & Sue" and signed "Cheatem Good". This check was pictured next to a photograph of Justice Resnick. Footage in the commercial also included yellow page ads of two pictured but unnamed Ohio attorneys. The implication was that the depicted lawyers represented plaintiffs. Uncontroverted testimony during the hearing demonstrated that neither attorney had received prior notice of the use of their telephone advertisement, nor

had they provided their consent. Evidence was presented that one of the depicted lawyers, a workers compensation specialist, had donated one thousand, thirty-eight dollars to the campaign of Justice Resnick.

At the time Judge Harper reviewed the ad, she requested that it be changed to include her middle initial which she considered to be an important part of her identity and prior campaign advertisements. This was never done.

Judge Harper had never before used a television campaign ad. She acknowledged that the hard-hitting, critical nature of the ad was unlike any campaign advertisement she had ever used. Her other campaign ads were solely related to her own qualifications and abilities. With eight days remaining before the election, Judge Harper approved the airing of the ad. The television advertisement can only be properly understood by viewing it. (See Exhibit "A" attached).

The $300,000.00 figure used in the advertisement was a product of research conducted by the Ohio Republican Party. The number was arrived at by comparing the Judge Resnick campaign finance reports filed in 1994 with members of the Ohio Academy of Trial Lawyers, their relatives and political action committees associated with the Ohio Academy of Trial Lawyers. One hundred and fifteen thousand dollars in funds were received from political action committees

associated with the Ohio Trial Lawyers. Twenty-five thousand dollars was received from relatives of the Ohio Academy of Trial Lawyers member, and $166,000.00 was received from actual members of the Ohio Academy of Trial Lawyers. The total funds calculated to have been received from the three groups was $306,000.00. the accuracy of these compilations was not challenged at the hearing.

II. CONCLUSION OF LAW

The Respondent was charged with violating five Judicial Canons: Canon 1 (failing to observe and enforce high standards of conduct so that the integrity and independence of the judiciary may be preserved); Canon 2A (failing to conduct herself so as to promote public confidence in the integrity and impartiality of the judiciary); Canon 7B(1)(a) (failing to maintain the dignity appropriate to judicial office); Canon 7B(1)(c) (announcing her views on disputed legal or political issues or misrepresenting facts); and, Canon 7C(9) (knowingly or recklessly circulating false statements concerning a candidate to promote the defeat of the candidate).

A. Canon 7C(9). Knowingly or recklessly circulating false statements concerning a candidate to promote the defeat of the candidate.

At the time the television advertisement was created and played on television, Canon 7C(9) read as follows:

> C. Campaign Guidelines. No incumbent judge or candidate for judicial office during the course of any campaign for nomination or election to judicial office, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall purposely do any of the following:
>
> ***
>
> (9) Post, publish, circulate, or distribute a written or printed false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate.

To provide a violation of 7C(9) Relator must demonstrate by clear and convincing evidence that the advertisement contained statements that Respondent knew were false or that she made the statements with reckless disregard of their falsity. The panel finds that Relator has not met this burden.

Testimony was received from Bret Thomas Buerck, a Republican Party employee who complied the campaign contribution research. He testified that the contributions to the Resnick campaign from members of the Ohio Academy of Trial Lawyers, their families and Ohio Academy of Trial Lawyers (OATL) public action

committees totalled $306,000.00. No effort was made by Relator to contest the computation.

Relator argues that Respondent's advertisement stated that Justice Resnick received more than $300,000.00 just from plaintiffs' lawyers is false, since $25,000.00 of the contributions came from OATL family members. It is argued by respondent that family contributions are the functional equivalent of contributions by the lawyers themselves. the panel is loath to base a finding of misconduct on such a fine distinction, comfortably made in hindsight, for an advertisement produced in the waning days of a very hotly contested statewide election. Respondent had not proved by clear and convincing evidence that the ad was untruthful in this respect.

While one could argue the truthfulness of other assertions in the ad, i.e. "Justice Resnick [could] make it easier for [plaintiffs' lawyers] to collect millions in fees", these statements are general in nature and not of sufficient particularity in this case to rise to the level of knowing falsehoods.

It is clear that this matter is less about false statements than maintaining the dignity, integrity and independence of the courts and legal system. As Justice Resnick herself testified, her complaint was filed not because false statements were made about her but because the advertisement did not

"promote public confidence in the integrity and impartiality of the judiciary and legal profession." (Transcript, pg. 183).

Judge Harper testified that she believed the commercial to be hard-hitting but truthful. She relied for the truthfulness of the ad upon her review of the campaign contribution research conducted by the Republican Party. Relator was unsuccessful in proving by clear and convincing evidence that Judge Harper knew the statements in the ad were false or published them with reckless disregard for their falsity.

The panel recommends the claimed violation of Canon 7C(9) be dismissed.

B. Canon 7B(1)(c). "An incumbent judge, or a candidate for judicial office:...(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position, or other facts."

Canon 7B(1)(c) contains three essential prohibitions: (1) no announcing views on disputed legal or political issues; (2) no pledges of conduct in office other than the faithful and impartial performance of the duty; and (3) no misrepresentation of one's identity, qualifications, position, or other similar fact. Relator alleged that

Judge Harper violated Canon 7B(1)(c) by the inferences from the ad about plaintiffs' lawyers, the effect of campaign contributions on judicial decision making, liberal rulings, and large attorney fee awards. Relator claims that these negative statements or inferences constitute a pronouncement of opinion by Judge Harper on legal and political issues in contravention of the Canon. While not condoning the nature of content of the inferences to be drawn from this ad, the panel does not find by clear and convincing evidence that they constitute statements of opinion sufficiently specific to violate the Canon. Accordingly, the panel recommends that the claim of violation of Canon 7B(1)(c) be dismissed.

C. Canon 7B(1)(a) A judge or candidate for judicial office should maintain the dignity appropriate to judicial office.

Canon 1 Failing to observe and enforce high standards of conduct so that the integrity and independence of the judiciary may be preserved.

Canon 2(A) Failing to conduct herself so as to promote public confidence in the integrity and impartiality of the judiciary.

These three Canons will be considered together since they all are general in nature and do not prescribe specific conduct.

1. Judicial Canon 7B(1)(a)

Canon 7B(1)(a) provides in pertinent part:

> (1) an incumbent judge, or a candidate for judicial office: (a) should maintain the dignity appropriate to judicial office...

The allegation has been made that the television advertisement used in Judge Harper's campaign is violative of the dignity appropriate to judicial office. Respondent has vehemently argued that the dignity standard cannot constitutionally be applied to her in the context of this campaign commercial given the core protections for political speech contained in the First Amendment to the United States Constitution. Respondent likewise argues that the dignity standard is impermissibly vague in that if fails to describe with sufficient particularity the conduct that is proscribed by the Code. Relator's own expert witness testified during the hearing that the word "dignity is a vague word, difficult to use in discipline cases. (Transcript, p. 152, 156.)

The panel does not believe that advertisement of Judge Harper is representative of the dignity to which Judge ought to aspire in Ohio. However, in the absence of specific misconduct proscribed by the rules, the panel cannot find by clear and convincing evidence that the conduct of Judge Harper in consenting to the airing of this advertisement rises to the level of a

violation of Canon 7B(1)(a). The allegation therefore should be dismissed.

2. Judicial Canon 1 and 2A

Canon 2 provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shou
ld himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2A provides:

> A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Like Canon 7B(1)(a), Canon 1 and 2A are general in nature. Given the core political speech protection of the First Amendment to the Constitution, the lace of conduct violative of specific prohibition in the Canons, and the nature and context of this advertisement, the panel does not believe it appropriate in this unique case to find violations of the most general and aspirational of all the Judicial Canons. The panel therefore

recommends the dismissal of allegations charging a violation of Canon 1 and 2A.

Conclusion of the Panel

Ohio has chosen to have judicial candidates compete in election for judicial office. With that choice comes the expectation that candidate will engage in activity to convince the electorate that they and not their opponent should be elected to office. There is a tension between campaign activity to create an informed electorate and the constraints imposed bay the Judicial Canons. In evaluating alleged misconduct in this setting it is necessary to weigh the gravity of the claimed violation with the practical reality of a heated campaign for public office.

The Judge Sara J. Harper campaign advertisement should not have been aired. Judicial candidates are responsible for the campaign advertisements produced and shown in their behalf and have a duty to conform them to the requirements of the Judicial Canons. (See new Judicial Canon 7F.) However, the panel does not believe, in the circumstances of this case, where clear and convincing evidence of the falsity of the television ad is missing, that the political advertisement is so egregious as to warrant a formal sanction under the broadly written general Canons governing judicial conduct.

Deliberations by the Board

The Board proceeded to hear the report of the panel chair, Richard Milligan, and consider the panel's recommendation for dismissal. As part of the report and its deliberations, Board members viewed a video tape of the campaign television advertisement in question. Board members Trimboli, Greene, Webb, Rathman and Evans abstained from voting or participating in the deliberations.

First a vote was taken on the hearing panel's recommendation to dismiss this matter in its entirety. The motion failed upon recorded vote.

After further discussion a motion was made and properly seconded to find a violation of Canon 7B(1)(a). This motion carried upon a vote of the Board. A motion was also presented to find a violation of Canon 2(A). This motion passed by a vote of the Board. The Board next unanimously approved of the balance of the panel's report dismissing charges based on violations of Canon 1 and Canon 7B(1)(c) and 7C(9).

The Board found that the campaign advertisement was reviewed by the Respondent before it was publicly aired and that under the Ohio Code of Judicial Conduct and Canon 7, Judge Harper was responsible and accountable for that decision. While the dollar amount of contributions received was true, taking the campaign advertisement as a whole,

the Board felt it undermined public confidence in the integrity and impartial decision-making of one justice. In directly suggesting to Ohio voters that a justice's decisions were influenced by the receipt of campaign contributions, the advertisement established a lack of dignity appropriate to judicial office. The television advertisement in question sent an unfounded message to Ohio voters. In picturing a phony check from the law firm of "Sue and Sue" signed by "Cheatem Good" combined with the text of the advertisement, it was reasonable to conclude that:

(1) Certain lawyers are dishonest.

(2) One justice is associated with those lawyers.

(3) There is something improper about lawyers contributing to a judicial campaign.

(4) A justice appears to be the captive of one class of litigants, group of lawyers, or special interest.

In fact these implications are not true or Respondent has no information or evidence at hand to support the innuendos (see Respondent's affidavit).

Therefore the airing of this commercial undermined public confidence in the integrity and impartiality of the judiciary. by authorizing its use in the campaign, the Respondent failed to

maintain the dignity appropriate to judicial office.

The Board's sanction serves the state's interest in protecting the good reputation of its judiciary and in assuring the integrity and professional conduct of the judiciary.

The Respondent has presented no argument or constitutional claim that gives a judicial candidate the right to openly denigrate the Court or an individual justice in the eyes of the public. Based on the foregoing the Board voted to recommend the imposition of the public reprimand for Respondent for the acts of campaign misconduct in violation of Canon 7B(1)(a) and Canon 2(A).

RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(1), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 14, 1996. The Board adopted the Findings of Fact, Conclusions of Law consistent with its deliberations. The Board recommends pursuant to Gov. Bar Rule V(6)(L) that

the Respondent, Judge Sara J. Harper, be publicly reprimanded. The board further recommends that the costs of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	)	
	)	1996
	)	TERM
	)	
Relator,	)	CASE
	)	NO.96-
	)	1551
	)	
v.	)	
	)	**ORDER**
JUDGE SARA J. HARPER,	)	
	)	
Respondent.	)	
	)	
	)	

On July 2, 1996, the Board of Commissioners on Grievances and Discipline filed its Amended Final Report in this Court recommending that pursuant to Rule V, Section 6(B) (5) of the Supreme Court Rules for the Government of the Bar of Ohio the respondent, Judge Sara J. Harper, be publicly reprimanded. Respondent filed objections to said Amended Final Report, and this cause was considered by the Court. On consideration thereof,

IT IS ORDERED AND ADJUDGED by this Court that pursuant to Gov. Bar R. V, Sec. 6(B) (5), and consistent with the opinion rendered herein respondent, Judge Sara J. Harper, Attorney Registration Number 0023730, be publicly reprimanded, and this entry shall constitute the

public reprimand, provided however, that should the respondent, Judge Sara J. Harper, be found guilty of subsequent misconduct, this public reprimand shall be considered as a factor that my justify an increase in the degree of discipline to be imposed for subsequent misconduct.

IT IS FURTHER ORDERED that respondent be taxed the costs of these proceedings in the amount of One Thousand Ninety-One Dollars and Seventy-One Cents ($1,091.71), which costs shall be payable to this Court by certified check or money order on or before 90 days from the date of this order. It is further ordered that if these costs are not paid in full on or before 90 days from the date of this order. It is further ordered that if these costs are not paid in full on or before 90 days from the date of this order, interest at the rate of 10% per annum shall accrue on the balance of unpaid Board costs, effective 90 days from the date of this order, respondent may be found in contempt and may be suspended until costs, including any accrued interest, are paid in full.

IT IS FURTHER ORDERED, sua sponte, that all documents filed with this Court in this case shall meet the filing requirements set forth in requirements as to form, number, and timelines of filings.

IT IS FURTHER ORDERED, sua sponte, that service shall be deemed made on respondent by sending this order, and all other orders in this case, by certified

mail to the most recent address respondent has given to the attorney registration office.

IT IS FURTHER ORDERED that the Clerk of this Court issue certified copies of this order as provided for in Gov. Bar R. V, Sec. 8(D) (1), that publication be made as provided for in Gov. Bar R. V, Sec. 8(D) (2), and that respondent bear the costs of publication.

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCE AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	)	Case No.:
	)	95-38
	)	
Complaint against:	)	
	)	
	)	**COMPLAINT**
JUDGE SARA J. HARPER,	)	**AND**
EIGHTH DISTRICT COURT OF APPEALS	)	**CERTIFICATE**
1 LAKESIDE AVENUE	)	**(RULE V OF**
Cleveland, Ohio 44113	)	**THE SUPREME**
CLEVELAND, OHIO 44113	)	**COURT RULES**
	)	**FOR THE**
	)	**GOVERNMENT**
	)	**OF THE BAR**
Respondent	)	**OF OHIO.)**
	)	
DISCIPLINARY COUNSEL,	)	
175 SOUTH THIRD STREET	)	
SUITE 280	)	
COLUMBUS, OHIO 43215	)	
	)	
Relator	)	
	)	

Now comes the Relator and alleges that Judge Sara Juanita Harper, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

1. Respondent, Sara Juanita Harper, was admitted to the practice of law in Ohio on August 21, 1952. At all

times relevant hereto, Respondent served as a judge on the Ohio Court of Appeals for the Eighth Appellate District. Respondent is subject to the Code of Professional Responsibility, the Code of Judicial Conduct, the Supreme Court Rules for the Government of the Bar and the Supreme Court Rules for the Government of the Bar and the Supreme Court Rules for the Government of the Judiciary.

2. During the 1994 election campaign, Respondent was a judicial candidate for the Ohio Supreme Court. In connection with that judicial campaign, Respondent and her judicial campaign commercial is attached hereto and incorporated by reference herein as Exhibit A.

3. The campaign commercial suggested that Respondent's campaign opponent, Justice Alice Robie Resnick, received substantial financial contributions from plaintiffs' trial lawyers, and as a consequence, would necessarily be beholden to them. The audio portion of the campaign commercial indicated the following:

> On Ohio's Supreme Court, one Justice has a problem--it's money. Most of Resnick's money comes from just one place: the plaintiffs' lawyers who sue, sue, sue--over $300.000.00 just from them. This small group of suing lawyers wants Resnick, with her liberal rulings, to make it easier for them to collect millions in fees. It's time for a change to

Judge Sara Harper--recommended, endorsed, highly rated, 20 years as a judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.

4. The visual portion of the campaign commercial depicted, inter alia, a check in the amount of $300,000.00 from "the law firm of Sue & Sue" and signed "Cheatem Good." The check was payable to Justice Resnick, implying that the check was payable to Justice Resnick and/or her campaign. Further pictured in the campaign commercial, were the telephone directory advertisements of two (2) unnamed Ohio attorneys whose advertisements suggested that they represented Plaintiffs, further creating the impression that Justice Resnick decided cases in favor of lawyers who contributed to her judicial campaign. Neither of said attorneys, Michael D. Dorf, Esq. nor Samuel G. Bolotin, Esq., had consented to the use of their telephone directory advertisements for this purpose.

5. Respondent is charged with violating the Code of Judicial Conduct as follows: Canon 1 (failing to observe and enforce high standards of conduct so that the integrity and independence of the judiciary may be preserved); Canon 2A (Failing to conduct herself so as to promote public confidence in the integrity and impartiality of the judiciary); Canon 7B(1) (a) (failing to maintain the dignity appropriate to judicial office); Canon 7B(1)(c) misrepresenting facts); and, Canon 7C(9)

(knowingly or recklessly circulating false statements concerning a candidate to promote the defeat of the candidate).

CODE OF JUDICIAL CONDUCT

Effective December 20, 1973
Including Amendments Received Through
July 15, 1994

PREFACE

This Code, consisting of statements of norms denominated canons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated.

CANON 1
A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2
A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself

at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. Judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like

while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. Nothing contained herein, however, shall preclude a judge from non-substantive ex parte communications on procedural matters and matters affecting prompt disposal of the business of the court.

Commentary

The proscription against communications concerning a proceeding includes communication from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal

issues is to invite him to file a brief amicus curiae.

(5) A judge should dispose promptly of the business of the court and give appropriate attention to the guidelines set forth in the rules of superintendence promulgated by the Supreme Court of Ohio.

Commentary

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6)(a) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(b) A justice or judge shall not knowingly disclose or cause to be disclosed, without appropriate authorization, information regarding the probable or actual decision in a case or legal proceeding pending before a court, including the vote of a justice, judge, or court in a case pending before the

Supreme Court, a court of appeals, or a panel of judges of a trial court, prior to the announcement of the decision by the court or journalization of an opinion, entry, or other document reflecting that decision under either of the following circumstances:

Commentary

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7-107 of the Code of Professional Responsibility.

(7) A trial judge or appellate court should permit:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings; and

(c) the broadcasting, televising, recording, and taking of photographs in the courtroom by news media during sessions of the court, including recesses between sessions, under the following conditions:

(i) permission should be expressly granted in advance in writing by the trial judge or appellate court pursuant

to such conditions as the judge or appellate court and superintendence rules of the Supreme Court may prescribe;

(ii) the trial judge or appellate court determines, upon consideration of a request for permission for the broadcasting, televising, recording, or taking of photographs in the courtroom in a particular case, that the broadcasting, televising, recording, and taking of photographs would not distract participants or impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair trial or hearing therein;

(iii) the filming, videotaping, recording, or taking of photographs of victims or witnesses who object thereto shall not be permitted;

(iv) the filming, videotaping, recording, or taking of photographs of jurors shall not be permitted.

B. Administrative responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should encourage his staff and court officials subject to his direction and control to observe the

standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, eliminating nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians, appraisers and personnel such as clerks, secretaries, bailiffs and all other court employees and appointees. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal

knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned
because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

Commentary

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial

interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of disqualification

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

SPECIAL PROVISIONS FOR MEMBERS OF THE SUPREME COURT OF OHIO

C. Disqualification

(1) A justice shall disqualify himself or herself in a proceeding in which the justice's impartiality might reasonably be questioned, including but not limited to instances where:

(c) (i) For merit cases, the justice knows that, individually or as a fiduciary, the justice or the justice's spouse or minor child residing in the justice's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(ii) For miscellaneous motions, motions to certify, or similar matters, the justice knows that, individually or as a fiduciary, the justice or the justice's spouse or minor child residing in the justice's household, has a

substantial financial interest in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the outcome of the proceeding.

(d) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the justice to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the justice's knowledge likely to be a material witness in the proceeding.

(2) A justice should keep informed about the justice's personal financial interests of the justice's spouse and minor children residing in the justice's household.

D. Remittal of disqualification

A justice disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If, based on

such disclosure, the parties and lawyers, independently of the justice's participation, all agree in writing that the justice's relationship is immaterial or that the justice's disqualification should be waived, the justice is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

CANON 4
A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5
A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary

Complete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would

ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should disqualify himself in any case in which the decision could affect any organization which he serves as either an officer or member of the board.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions, charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(3) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, except he may participate as a member in solicitations limited to members of an educational, religious, charitable, fraternal or civic organization of which he is a member, and he may be listed as an officer, director, or trustee of such an organization. He

should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

(4) A judge may serve on the board of directors or trustees of such an organization even though it has the responsibility for approving investment decisions.

Commentary

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. Financial Activities. (1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge engaged in a family business at the time this Code becomes effective.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him, not to exceed $100 in value; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or

loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Commentary

This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

Commentary

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a substantial financial interest and to advise counsel where he or his family have any financial interest in the proceedings; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his

judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

Commentary

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. Full-time judges, including those persons designated as judges in the Compliance section of this Code, should not practice law. Part-time judges, including those persons designated in the Compliance section of this Code, may practice law subject to the restrictions in the Compliance section of this Code. The judge or judges under whom a particular referee, or other such officer of a judicial system, serves are charged

with the responsibility of securing the referee's compliance with the Code. That does not eliminate the particular referee's responsibility for compliance.

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

CANON 6
A JUDGE SHOULD REGULARLY FILE FINANCIAL DISCLOSURE STATEMENTS REQUIRED BY

STATUTES AND REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should file annually the disclosure statement required by R.C. 102.02 and a report of the date, place, and nature of any quasi-judicial or extra-judicial activity for which he received compensation, and the name of the payor and the amount of compensation so received for such quasi-judicial or extra-judicial activity with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

and with the clerk of the court on which he serves or for such activity in multi-county judicial districts with either the clerk of the court of his county of residence or the clerk of the court of the most populous county in such district. The report required to be filed with the Board of Commissioners on Grievances and Discipline shall be filed by April 15 of each year on forms provided by the Board.

CANON 7
JUDGES AND JUDICIAL CANDIDATES SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE

A. Political Conduct in General

(1) An incumbent judge, or a candidate for judicial office, should not;

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate at a political meeting or publicly endorse a candidate for public office.

Commentary

A candidate does not publicly endorse another candidate for public office by having his or her name on the same ticket or attending a fund raising event for a candidate.

(2) Incumbent judges, and candidates for judicial office, may

appear together in campaign advertisements, but should not, in those advertisements, endorse another judicial candidate. Joint advertisements may be paid for by the candidates or by a political party.

Commentary

The commentary to Canon 7(A)(1)(b) makes it clear that running on the same ticket with another candidate for political office is not a public endorsement. The exception in this division allows candidates for judicial office to appear together in advertisements. The sharing of advertisements by candidates is an attempt to minimize the expense of campaign advertising.

There are instances, however, in which an advertisement goes beyond merely being on the same ticket and becomes an endorsement. Advertisements which focus on candidates as an integrated team or partnership begin to give the appearance of an endorsement.

"Endorse" has been denied as "to give approval of or support to" Webster's II New Riverside University Dictionary (1984). An advertisement that has candidates speaking in terms of "our," "us," or "we" implies approval or support and is prohibited. Joint advertisement must maintain the individual and independent nature of each candidate's campaign.

(3) An incumbent judge, or a candidate for judicial office, may attend political gatherings and may identify himself or herself as a member of a political party. He or she may speak to such political gatherings on his or her own behalf when he or she is a candidate for election or re-election.

(4) A judge should resign from office when he or she becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that he or she may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so. "Candidate" means any qualified person certified in accordance with the provision of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state, or any qualified person who represents himself or herself to be a write-in candidate, or who knowingly assents to such representation by another at either a primary, general, or special election to be held in this state.

(5) a judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

Commentary

For definition of the term

"candidate" as used in R.C. Sections 3517.08 to 3517.15 and 3517.99 governing the collection, expenditure and reporting of campaign contributions, see R.C. 3517.01(b)(3).

B. Campaign Conduct.

(1) An incumbent judge, or a candidate for judicial office:

(a) should maintain the dignity appropriate to judicial office;

(b) should discourage public officials, appointees, or employees subject to his or her direction or control from soliciting or accepting campaign fund contributions for him or her;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position, or other facts.

(2) An incumbent judge, or a candidate for judicial office that is filled by public election between competing candidates, should not himself solicit or accept campaign funds, but he or she may establish a committee of responsible persons to secure and manage the expenditure of funds or his or her campaign and to obtain public statements of support for his or her candidacy. the

committee should not, directly or indirectly, solicit or receive any assessment, subscription, or contribution for any political or personal purpose whatsoever from any employee, appointee of the court, or anyone who does business with the court, but may solicit campaign contributions from lawyers.

A candidate's committee may begin soliciting funds for his or her campaign no earlier than 120 days before the first Tuesday after the first Monday in May of the year in which the general election, in which case the solicitation of funds may continue until 120 days after the date of the election at which the defeat occurred. In the case of death or withdrawal of a candidate, the solicitation of funds may continue until such time as the funds solicited are sufficient to pay the campaign debts and obligations of the candidate incurred on or before the date of death or withdrawal, plus the costs of solicitation incurred after the date of death or withdrawal, but in no event shall the solicitation of funds continue beyond 120 days after the date of death or withdrawal.

(a) The personal expenses of judicial candidate paid for by the candidate from his or her personal funds shall not be considered as a contribution or expenditure by the candidate for this or her own campaign and shall not be reported under this canon. Each candidate for judicial office shall have no more that one campaign committee for

purposes of receiving contributions and making expenditures. No campaign committee shall receive any contributions or make any expenditures other than through the campaign treasurer. The campaign treasurer shall file all statements required of a candidate or campaign committee required by this canon.

(b) Each judicial candidate shall, not later than the date he or she becomes a candidate, file a written statement setting forth the full name and address of the campaign treasurer with the clerk of the court in which the candidate seeks nomination or election to judicial office. In judicial districts having more that one county, such statement shall be filed with the clerk of the court of the most populous county of the district. In the event that the office of campaign treasurer shall become vacant, the judicial candidate shall promptly appoint a successor campaign treasurer and file a statement to this effect with the clerk of the court as referred to herein.

Commentary

These restrictions shall not be interpreted to prohibit a civic organization, bar association, or duly constituted and lawfully elected political party organization from raising funds and making expenditures in behalf of judicial candidates which it has decided to support. A candidate, including an incumbent judge, may appear

before an editorial board of a newspaper or a screening committee of a civic organization, bar association, or political organization for the purpose of the publication or organization.

(3) A candidate, including an incumbent judge, should not solicit or receive any assessment, subscription, or a contribution for any political or personal purpose whatever from any employee, appointee of the court, or anyone who does business with the court.

Commentary

Appointees of the court include officials such as referees, commissioners, special masters, receivers, guardians, appraisers, and personnel which as clerks, secretaries, bailiffs, and all other employees and appointees.

C. Campaign Guidelines. No incumbent judge or candidate for judicial office during the course of any campaign for nomination or election to judicial office, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall purposely do any of the following:

(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office, or use the term "re-elect" when the candidate has

never been elected at a primary, general, or special election to the office for which he or she is a candidate.

Commentary

Whenever an incumbent judge is a candidate for the same of different judicial office, the title "judge" may be used preceding the candidates's name in campaign materials and advertising. An incumbent judge who is a candidate for election to a different judicial office may use the title "judge", provided that its use does not imply that he or she currently holds the office for which he or she is a candidate. Any reference in a candidate's campaign materials to his or her opponent, who is the incumbent in the office being sought, shall include the opponent's title.

Whenever a candidate for a judicial office is not currently a judge, the title "judge" may appear only after of below the candidate's name in campaign materials and advertising. In such instances, words such as "elect" or "vote" must appear in prominent size lettering before the candidate's name, or the word "for" must appear in prominent size lettering between the candidate's name and the title "judge"

(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize of honor received, earned, or held

by a candidate; or the period of time during which a candidate attended any school, college, community technical school, or institution;

(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate held for which he or she received a salary or wages;

(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;

(5) Make a statement that a candidate has been indicted for any crime without disclosing the outcome of any legal proceedings resulting from the indictment;

(6) Make a false statement that a candidate or official has a record of treatment or confinement for mental disorder;

(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged form the armed services;

(8) Falsely identify the source of a statement, issue statements, either knowing the same to be false or with reckless disregard of whether is was false or not, concerning a candidate that

is designed to promote the election, nomination, or defeat of the candidate.

COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-Time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C, except that a part-time judge must file the annual disclosure statement required by R.C. 102.02;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge who is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5C(2), D, E, G, and Canon 6C.

EFFECTIVE DATE OF COMPLIANCE

This Code is hereby made effective December 20, 1973.

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. In any event a non-incumbent who has been elected to, is elected to, or has been or is appointed to a judicial position to which this Code is applicable shall fully and completely comply with

the Code at the beginning of his term of office. An incumbent judge shall be in full compliance with all the provisions of this Code no later than the date upon which his next term of office begins; provided, all judges must be in full compliance with the provisions of Canon 3B(4) no later than July 1, 1974.

673 N.E.2d 1253
(Cite as: 77 Ohio St.3d 211, 673 N.E.2d 1253)

In re COMPLAINT AGAINST Judge HARPER.

No. 96-1551.

Supreme Court of Ohio.

Submitted Sept. 3, 1996.

Decided Dec. 5, 1996.

Disciplinary proceedings were instituted concerning advertisement run by judge seeking election to Supreme Court. The Supreme Court, Brogan, C.J., held that: (1) where hearing panel did not order dismissal of charges, but instead merely recommended that the charges be dismissed, it was proper for board to review the matter; (2) it was not necessary for disciplinary counsel to offer evidence of public opinion polls or testimony from witnesses who claimed to have been misled in order to establish that advertisement concerning contributions received by the incumbent diminished public confidence in the judiciary; (3) all of the Judicial Canons in the Code of Judicial Conduct, except Canon 4, establish mandatory standards of conduct for Ohio judges; (4) Canons prohibiting conduct that diminishes confidence in integrity of judiciary and requiring judge to maintain dignity of judicial office were not vague as applied to advertisement; (5) Canons do not prohibit truthful criticism, and they

thus are not overbroad; (6) statement in judge's campaign advertisement that a small group of plaintiffs' attorneys wanted to retain the incumbent because her liberal rulings made it easier for them to collect large fees was statement of opinion; (7) statement was not improper expression of opinion on disputed legal matter; but (8) other parts of advertisement improperly implied that incumbent was associated with attorneys who were somehow dishonest and making improper contributions, and thus were not constitutionally protected and violated canons.

Respondent reprimanded.

Walsh, J., filed a concurring opinion.

[1] ATTORNEY AND CLIENT k57
45k57
Supreme Court, not disciplinary board, makes the ultimate conclusion, both as to the facts and as to the action, if any, that should be taken with respect to attorney's conduct.

[2] ATTORNEY AND CLIENT k57
45k57
In disciplinary cases, board of commissioners acts for and on behalf of Supreme Court and, in doing so, it makes recommendations as to the facts which should be found and the action which should be taken by Court, but Court has full responsibility for determining what the facts are and what action should be taken on those facts.

[3] ATTORNEY AND CLIENT k57
45k57
In assessing propriety of attorney's conduct and the appropriate sanction, if any, Supreme Court is not bound by either hearing panel's or disciplinary board's conclusions as to fact or law.

[4] JUDGES k11(5.1)
227k11(5.1)
Where hearing panel did not order dismissal of charges against judge and notify all interested parties, but instead merely filed its findings and recommended that the charges be dismissed, it was proper for disciplinary board to review the matter. Government of the Bar Rule V, § 6(H, J).

[5] JUDGES k11(7)
227k11(7)
It was not necessary for disciplinary counsel to offer evidence of public opinion polls or testimony from witnesses who claimed to have been misled in order to establish that judge's campaign commercial concerning contributions received by the incumbent diminished public confidence in the judiciary. Code of Jud.Conduct, Canon 2, subd. A.

[6] JUDGES k11(4)
227k11(4)
Objective standard should be applied to prohibition on conduct by judge that would diminish confidence in the judiciary; inappropriate actions include conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public

esteem for the judicial office.

[7] JUDGES k11(7)
227k11(7)
Even if evidence that public confidence in integrity and impartiality of the judiciary was, in fact, undermined was required in order to establish that judge's conduct had that effect, it was presented by fact that attorney with no apparent connection to parties saw judge's campaign advertisement and wrote a letter of complaint to the Supreme Court. Code of Jud.Conduct, Canon 2, subd. A.

[8] JUDGES k11(2)
227k11(2)
Language of the Canons of Judicial Ethics prohibiting conduct that diminishes confidence in integrity of judiciary and requiring judge to maintain dignity of judicial office is not merely hortatory or advisory, even though they use the word "should," rather than "shall." Code of Jud.Conduct, Canon 2, subd. A.; Code of Jud.Conduct, Canon 7, subd. B(1)(a) (1994).

[9] JUDGES k11(2)
227k11(2)
All of the Judicial Canons in the Code of Judicial Conduct, except Canon 4, establish mandatory standards of conduct for Ohio judges. Code of Jud.Conduct, Canon 4.

[10] STATUTES k47
361k47
Vague law impermissibly delegates basic

policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. U.S.C.A. Const.Amend. 14.

[11] CONSTITUTIONAL LAW k42.2(1)
92k42.2(1)
When the vice of a statute is its vagueness, litigant asserting the vagueness defense must demonstrate that statute is vague as applied to the litigant's conduct without regard to its potentially vague application to others. U.S.C.A. Const.Amend. 14.

[12] CONSTITUTIONAL LAW k82(4)
92k82(4)
In the First Amendment area, objectionable aspects of vagueness need not depend upon the absence of fair notice, for the First Amendment's demand for specificity is also a product of the concern for a statute's chilling effect. U.S.C.A. Const.Amend. 1.

[13] CONSTITUTIONAL LAW k82(11)
92k82(11)
Canons prohibiting conduct that diminishes confidence in integrity of judiciary and requiring judge to maintain dignity of judicial office were not vague as applied to judge's campaign advertisements, which referred to contributions to incumbent's campaign, in view of preexisting case law and interpretive disciplinary board opinion. U.S.C.A. Const.Amends. 1, 14; Code of Jud.Conduct, Canon 2, subd. A.; Code of Jud.Conduct, Canon 7, subd. B(1)(a)

(1994).

[13] JUDGES k11(2)
227k11(2)
Canons prohibiting conduct that diminishes confidence in integrity of judiciary and requiring judge to maintain dignity of judicial office were not vague as applied to judge's campaign advertisements, which referred to contributions to incumbent's campaign, in view of preexisting case law and interpretive disciplinary board opinion. U.S.C.A. Const.Amends. 1, 14; Code of Jud.Conduct, Canon 2, subd. A.; Code of Jud.Conduct, Canon 7, subd. B(1)(a) (1994).

[14] CONSTITUTIONAL LAW k82(4)
92k82(4)
Overbreadth challenge is predicated on proposition that clear and precise enactment may be overbroad in its reach if it prohibits constitutionally protected conduct; in addressing overbreadth challenge, crucial question is whether the legislation sweeps within its prohibitions what may not be punished under the First Amendment. U.S.C.A. Const.Amend. 1.

[15] CONSTITUTIONAL LAW k82(4)
92k82(4)
Overbreadth is avoided if regulation or legislation in question may be narrowed by reasonable construction, including interpretation by the agency responsible for enforcement. U.S.C.A. Const.Amend. 1.

[16] CONSTITUTIONAL LAW k90(3)
92k90(3)
Speaker cannot be punished because of his viewpoint or message unless the restriction is necessary to promote a compelling government interest. U.S.C.A. Const.Amend. 1.

[17] CONSTITUTIONAL LAW k90(3)
92k90(3)
Content-based restrictions receive high level of judicial scrutiny and will be upheld only if they are narrowly drawn to achieve important or substantial governmental interest that is unrelated to the suppression of free expression. U.S.C.A. Const.Amend. 1.

[18] JUDGES k11(2)
227k11(2)
To the extent Canons of Judicial Ethics are interpreted to prevent truthful criticism of the judiciary, they are unconstitutionally overbroad. U.S.C.A. Const.Amend. 1.

[19] JUDGES k11(2)
227k11(2)
Canons of Judicial Ethics do not prohibit truthful criticism, so long as the criticism is done fairly, accurately, and upon facts, not false representations, and they thus are not overbroad. U.S.C.A. Const.Amend. 1.

[20] JUDGES k11(2)
227k11(2)
There was nothing wrong with judge informing the public that incumbent whom she was challenging received substantial

contributions from special interest group. Code of Jud.Conduct, Canon 2, subd. A.; Code of Jud.Conduct, Canon 7, subd. B(1)(a) (1994).

[21] JUDGES k11(2)
227k11(2)
Statement in judge's campaign advertisement that a small group of plaintiffs' attorneys wanted to retain the incumbent because her liberal rulings made it easier for them to collect large fees was statement of opinion.

[22] CONSTITUTIONAL LAW k90.1(5)
92k90.1(5)
Opinions are protected under the First Amendment, but First Amendment protection does not adhere to statements of opinion that imply false assertions of fact. U.S.C.A. Const.Amend. 1.

[23] JUDGES k11(2)
227k11(2)
Statement in judge's campaign advertisement that a small group of plaintiffs' attorneys wanted to retain the incumbent because her liberal rulings made it easier for them to collect large fees was not improper expression of opinion on disputed legal matter. Code of Jud.Conduct, Canon 7, subd. B(1)(a) (1994).

[24] CONSTITUTIONAL LAW k90.1(1.2)
92k90.1(1.2)
Statements in judge's campaign advertisements concerning incumbent's receipt of contributions from association of plaintiff's attorneys and the

incumbent's rulings favoring association's positions improperly implied that incumbent was associated with attorneys who were somehow dishonest and making improper contributions, and thus were not constitutionally protected and violated canons prohibiting conduct that diminishes confidence in integrity of judiciary and requiring judge to maintain dignity of judicial office. U.S.C.A. Const.Amend. 1; Code of Jud.Conduct, Canon 2, subd. A.; Code of Jud.Conduct, Canon 7, subd. B(1)(a) (1994).

[24] JUDGES k11(2)
227k11(2)
Statements in judge's campaign advertisements concerning incumbent's receipt of contributions from association of plaintiff's attorneys and the incumbent's rulings favoring association's positions improperly implied that incumbent was associated with attorneys who were somehow dishonest and making improper contributions, and thus were not constitutionally protected and violated canons prohibiting conduct that diminishes confidence in integrity of judiciary and requiring judge to maintain dignity of judicial office. U.S.C.A. Const.Amend. 1; Code of Jud.Conduct, Canon 2, subd. A.; Code of Jud.Conduct, Canon 7, subd. B(1)(a) (1994).

****1255 *211** This matter is before a panel of the Ohio Supreme Court serving pursuant to Gov.Jud.R. II(4), for the purpose of reviewing the amended findings of fact, conclusions of law, and

recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("board") that Judge Sara J. Harper, Attorney Registration No. 0023730, of Cleveland, Ohio, be publicly reprimanded. [FN1] The present disciplinary proceeding stems from an advertisement approved by Judge Harper during the course of her 1994 campaign for justice of the Supreme Court. In that campaign, Judge Harper's opponent was incumbent Supreme Court Justice Alice Robie Resnick.

> FN1. This panel is composed of appellate judges from each district, with the exception of the Sixth and Eighth Districts, which have abstained.

Judge Harper has been involved in numerous political campaigns over many years, and has never been previously disciplined, nor has she been cited for prior disciplinary code violations. She was initially appointed to the Cleveland Municipal Court on December 31, 1970, ran in the Ohio Republican Party primary in 1976 for the Ohio Supreme Court, and then ran again in 1980 as the endorsed Republican candidate for the Ohio Supreme Court. Other than fourteen years in private practice, Judge Harper has been a judge either on the municipal bench or the court of appeals, where she is currently a judge, for twenty-two years.

In the 1994 campaign, Judge Harper was again the endorsed Republican candidate in the primary. In August 1994, she was

contacted by Robert Bennett, the Chairman of the Ohio Republican Party, about filming a commercial to be used in the campaign. Shortly thereafter, Bennett came to Cleveland and Judge Harper was filmed in various poses at the Cuyahoga County Courthouse. Nothing was disclosed to her about the nature **1256 of the projected campaign advertisement.

*212 Subsequently, on October 31, 1994, Judge Harper came to Bennett's office in Columbus to view the video of the proposed commercial. The video itself begins with a group picture of Justices of the Ohio Supreme Court, but in succeeding frames, focuses on Justice Resnick's picture only. The audio portion of the commercial states as follows:

"On the Ohio Supreme Court, one Justice has a problem. It's money. Most of Resnick's money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over $300,000.00 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees. It's time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, 20 years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper."

While the above text is playing, a series of pictures appear. The first is a group picture of the Justices of the Ohio Supreme Court. In the next frame, only Justice Resnick is featured, and the

accompanying text says, "Justice Has Problem." The third frame again shows Justice Resnick's picture and repeats the phrase "Justice Has Problem." However, this time, the phrase "... It's Money!" is added. The fourth frame once more features Justice Resnick's picture, with the caption, "Resnick's Money." The fifth frame of the ad is the same as the fourth, except that a large check is displayed, with the words "Trial Lawyers" and " 'Sue & Sue' " on the top left-hand corner of the check. In the portion of the check where one would normally see the dollar amount in the figure "Over $300,000.00," and the check is signed by "Cheatem Good."

The next two frames of the ad state that "Resnick's Liberal Rulings Help Lawyers Collect Millions." These frames also picture individuals, next to what appear to be ads making various claims, such as "Experienced in recovering large money awards," "NO FEE UNLESS YOU COLLECT," and "No Fee if No Recovery."

After reviewing the ad, Judge Harper approved its use, although she considered the ad "hard-hitting," "not [her] style," and something she wouldn't have done in her hometown of Cleveland. Moreover, at the time Judge Harper first saw the ad, she had the ability to make corrections and changes, but asked only that her middle initial be added.

The information about campaign finances in the ad was provided by Bret T. Buerck, a researcher for the Ohio Republican

Party. According to the information he compiled, Justice Resnick received for her 1994 campaign a total of over $307,000 from members of the Ohio Academy of Trial Lawyers ("OATL"), the families of OATL members, and political action committees associated with OATL, including ADOPT, which is the political action committee for OATL. *213 OATL's mission statement indicates that it is a group mainly interested in protecting the interests of plaintiffs.

At the time she viewed the ad, Judge Harper knew that money was an issue in the political consciousness and that the Ohio Supreme Court had appointed a seventeen-member committee to look into judicial elections and the financing of campaigns. Although Judge Harper did not have any particular decisions of Justice Resnick in mind when viewing the commercial, her opinion was that Justice Resnick was a liberal and that she (Harper), was a nonliberal. Judge Harper explained that she did not think the ad was unethical, nor did she feel the ad was about Justice Resnick. Her interpretation of the "problem" referred to in the commercial was the problem in the judiciary of financing campaigns and the perception the public has of judges.

Following Judge Harper's approval, the ad was aired on television a number of times during the election. The ad was brought to Justice Resnick's attention, and she viewed it on Wednesday, November 2, 1994. Justice Resnick was offended by the ad and interpreted it as implying

either that she had personally taken money or that justice was for sale. After viewing the ad, Justice Resnick received a letter from an attorney, Michael Garth Moore, who had also been offended **1257 by the ad. Consequently, Justice Resnick forwarded Moore's letter, along with a cover letter, to Disciplinary Counsel.

Both Moore and another attorney (whose picture had been featured in the ad) testified at the disciplinary hearing. Moore is a trial lawyer and about ninety percent of his practice consists of representing injured parties and people in employment discrimination cases. Although Moore belonged to OATL, he did not contribute to Justice Resnick's 1994 campaign. The inference he drew from the ad was that Justice Resnick changes her rulings in order to collect money. As a result of seeing the ad, he wrote a letter to Chief Justice Moyer objecting to the ad. The basis of Moore's concern was that if such campaign standards were allowed, the public would be persuaded even more than it is already that lawyers, including those on the Supreme Court, are unethical and dishonest.

Michael Dorf, whose picture appeared in the ad, specializes in workers' compensation cases for injured claimants in the Toledo area. Dorf did not give anyone permission to use his picture and was offended by the ad for several reasons, including the unauthorized use of his photo, the use of his photo to attack the court, and the fact that the

ad portrayed him in a negative light that was inconsistent with his reputation. Dorf also indicated that Justice Resnick had never ruled in his favor in any case. In addition to the two attorneys, both sides presented expert testimony from attorneys who had developed expertise in legal ethics as well as the area of judicial and attorney disciplinary matters.

***214** After receiving the complaint against Judge Harper and investigating the matter, the Disciplinary Counsel submitted a complaint to the board on May 1, 1995, charging Judge Harper with violating five Canons of the Code of Judicial Ethics: Canon 1 (failing to uphold the integrity and independence of the judiciary), Canon 2A (failing to conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary), Canon 7B(1)(a) (failing to maintain the dignity appropriate to judicial office), Canon 7B(1)(c) (announcing views on disputed legal or political issues or misrepresenting facts), and Canon 7C(9) (publishing or distributing a written or printed false statement, knowing the statement to be false or with reckless disregard of its falsity, concerning a candidate). A hearing was held before a three-member panel of the board on March 5, 1996, and elicited the testimony recounted above.

After the hearing, the panel issued findings of fact and a recommendation. Concerning Canon 7C(9), the panel found

that relator had failed to establish that OATL and the political action committees associated with it had not made the contributions as alleged by respondent. Accordingly, the panel recommended dismissal of this charge. Next, with regard to Canon 7B(1)(c), the panel, while not condoning the inferences in the ad, found that the statements in the ad were not sufficiently specific to violate the Canon against announcing views on disputed legal and political issues. Thus, the panel also recommended dismissal of this charge.

The remaining three violations were considered together, as they were general in nature and did not prescribe specific conduct. In this context, the panel again recommended dismissal, based on the absence of specific misconduct and the core political speech protections of the First Amendment.

Upon review of the panel decision, the board approved the portion of the panel report recommending dismissal of charges based on Canons 1, 7B(1)(c), and 7C(9). However, the board concluded that violations of Canons 2A and 7B(1)(a) had occurred, because the ad as a whole undermined public confidence in the integrity and impartiality of Justice Resnick. The board also found that the ad portrayed a lack of dignity appropriate to judicial office by suggesting to Ohio voters that a justice's decisions were influenced by receipt of campaign contributions. In particular, the board found that the ad

raised the following impermissible implications:

"(1) Certain lawyers are dishonest.

"(2) One justice is associated with those lawyers.

"(3) There is something improper about lawyers contributing to a judicial campaign.

****1258 *215** "(4) A justice appears to be the captive of one class of litigants, group of lawyers, or special interest."

Accordingly, the board voted to recommend imposition of a public reprimand.

Geoffrey Stern, Disciplinary Counsel, Alvin E. Mathews and Harold F. Craig III, Assistant Disciplinary Counsel, Columbus, for relator.

John C. Nemeth & Associates, John C. Nemeth and David A. Herd, Columbus, for respondent.

BROGAN, Chief Judge.

Respondent has objected to the board's recommendation, and raises the following four propositions of law:

"[I] The Board of Commissioners improperly reviewed this proceeding after the unanimous panel recommendation of dismissal.

"[II] The Board of Commissioners incorrectly found that Respondent's campaign television commercial undermined public confidence in the judiciary, when there was no evidence presented by Relator indicating any effect on public opinion or confidence.

"[III] Given Respondent's core political speech protections, under the United States Constitution, Canons 7B(1)(a) and 2A of the Code of Judicial Conduct are overbroad both facially and as applied to Respondent, and are too vague to have reasonably informed Respondent of what conduct or speech is intended to be precluded.

"[IV] The Board of Commissioners improperly focused on the graphic art display of an obviously facetious check in reaching its recommendation, when such display is afforded the same constitutional protection as the rest of Respondent's speech."

With the above background in mind, we now turn to consideration of the propositions of law advanced by Judge Harper.

I

[1] Before addressing the first proposition of law, we note as a starting point for analysis that the proper standard in disciplinary cases is that the Supreme Court, not the board, "makes the ultimate conclusion, both as to the facts and as to the action, if any, that

should be taken." Cincinnati Bar Assn. v. Heitzler (1972), 32 Ohio St.2d 214, 220, 61 O.O.2d 451, 454, 291 N.E.2d 477, 482, certiorari denied (1973), 411 U.S. 967, 93 S.Ct. 2149, 36 L.Ed.2d 687. Specifically, as indicated in Heitzler:

***216** [2][3] " 'In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts.' " Id., quoting Mahoning Cty. Bar Assn. v. Ruffalo (1964), 176 Ohio St. 263, 27 O.O.2d 161, 199 N.E.2d 396.

Therefore, in assessing the propriety of the conduct in question and the appropriate sanction, if any, we are not bound by either the panel's or the board's conclusions as to fact or law.

Judge Harper's first proposition is that the board improperly reviewed this matter after the panel unanimously recommended dismissal. We do not agree. In this context, Judge Harper's contention is that any disciplinary action must be dismissed if a unanimous panel recommends dismissal. However, under Gov.Bar R. V(6)(H) and (I), the panel may order dismissal if it finds the evidence insufficient to support a charge or it may file its certified report of the proceedings in accordance with Gov.Bar R.

V(6)(J). In the latter event, the board then reviews the matter and may refer it back to the panel for further evidence, take evidence before the board, or proceed on the certified report.

[4] In the present case, the panel did not order dismissal and notify all interested parties, including Judge Harper's local bar association, the bar association of the county where the complaint arose, and the Ohio State Bar Association, as specified in Gov.Bar R. V(6)(H). Instead, the panel filed its findings and the board then proceeded on the certified report, in accordance with Gov.Bar R. V(6)(J). Moreover, as relator has pointed ****1259** out, the language used by the panel did not order actions, but merely recommended that the charges be dismissed. Consequently, the board's review of this matter was proper, and respondent's first proposition is without merit.

II

[5] In her second proposition of law, Judge Harper argues that evidence of public opinion must have been presented before the board could find that the television campaign undermined public confidence in the judiciary. Again, we disagree, concluding that evidence of public opinion polls is not required to establish a finding that a judge has acted in a manner that diminishes public confidence in the judiciary.

In this regard, Canon 2A provides:

"A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

***217** The single authority cited to support Judge Harper's position is Ibanez v. Florida Dept. of Business & Professional Regulation (1994), 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118. In that case, an attorney who was also a certified public accountant was sanctioned by the state for using the term "CFP" (certified financial planner) next to her name in advertising. Id. at ---, 114 S.Ct. at 2088, 129 L.Ed.2d at 125. The state's position was that although the attorney actually had obtained the CFP designation, the use of "CFP" misled the public into believing that state approval and recognition existed for the designation. 512 U.S. at ----, 114 S.Ct. at 2089, 129 L.Ed.2d at 127. In rejecting the state's position, the Supreme Court noted that in the complete absence of any evidence of deception, concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. 512 U.S. at ----, 114 S.Ct. at 2090, 129 L.Ed.2d at 127-128. Moreover, in a footnote, the court further observed that no witness had testified, nor had any evidence been offered, that any member of the public had been misled. 512 U.S. at ----, 114 S.Ct. at 2090, 129 L.Ed.2d at 128, fn. 10.

We do not read these comments as requiring the state to offer evidence of public opinion polls, nor do we believe that the state must offer testimony from witnesses who claim to have been misled. In reviewing Ibanez, the reason for the Supreme Court's statement is obvious. Given the innocuous nature of the initials "CFP," which has no objectively deceptive connotation, evidence that the public, in fact, was misled would have been helpful. However, no such difficulty presents itself in the case at hand, since the language used is readily susceptible of interpretation by an objective observer, without resort to proof from members of the public.

As a further point, we note that our examination of disciplinary cases from this, as well as from other jurisdictions, does not reveal the use of public opinion polls or outside testimony to establish violations pertaining to public confidence in the judiciary. For example, no evidence from the public or opinion surveys was required to establish Canon 2A violations in Disciplinary Counsel v. Mosely (1994), 69 Ohio St.3d 401, 632 N.E.2d 1287 (Canon 2A violation found based on indictment and conviction for grand theft based on acts while in office), and Disciplinary Counsel v. Campbell (1993), 68 Ohio St.3d 7, 623 N.E.2d 24 (Canon 2A violation found based on complaints of unwelcome or offensive sexual remarks and/or physical contact by judge). Likewise, in Ohio State Bar Assn. v. Mayer (1978), 54 Ohio St.2d 431, 8 O.O.3d 434, 377 N.E.2d 770, the court

concluded that references to a fellow judge, among other things, as a liar, in conversations and public meetings, violated Canon 2A. There is no indication in that case that any testimony or evidence was taken from an outside source, i.e., the general public.

***218** Also of interest are the comments in Mayer construing R.C. 2701.12, then Gov.Bar R. VI (relating to suspension of judges for conduct that would bring the judicial office into disrepute), and the burden of proof required for a finding of misconduct ****1260** warranting suspension or removal of a judge. [FN2] R.C. 2701.12 lists several causes for removal or suspension including "violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office." R.C. 2701.12(A)(1). In Mayer, the appellant argued that the commission had erred in applying a lesser standard of proof than was appropriate. However, the Supreme Court rejected this argument, agreeing with the commission that the relator did not need to prove that " 'respondent's conduct would "in fact" result in a substantial loss of public respect or disrepute for the office,' " i.e., there was no need to prove actual loss of public respect. (Emphasis in original.) 54 Ohio St.2d at 437-438, 8 O.O.3d at 437, 377 N.E.2d at 774. Moreover, the evidence from which the commission and the Supreme Court drew the findings of Canon violations by clear and convincing evidence was not, as we noted above,

dependent on testimony from members of the public who stated that the actions in question caused them to lose respect for the judiciary.

> FN2. The portion of Gov.Bar R. VI at issue in Mayer uses the same language as current Gov.Jud.R. III(1)(C)(3), permitting removal or suspension of judges for engaging in conduct that would bring the judicial office into disrepute.

[6] Applying this discussion to the present case, what Judge Harper asks is that we apply the "in fact" or "actual loss" standard rejected in Mayer. This, we believe, would be inappropriate. What is apparent from the cases is that an objective standard should be applied, or in other words, inappropriate actions include "conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office." (Citation omitted.) In re Inquiry Concerning Baker (Miss.1988), 535 So.2d 47, 51. In reality, this is the standard courts have applied, but perhaps have not always specifically articulated, since common sense dictates that where a violation is subtle, more proof is needed. Thus, the need for greater evidence is obvious in Ibanez, as the alleged violation hinged on the use of a set of initials with no apparent improper meaning. By the same token, objective observers would agree, without further proof, that confidence in the judiciary is undermined when a judge is indicted on

several counts of grand theft while in office and is convicted after a plea of no contest to those charges. Mosely, 69 Ohio St.3d at 402, 632 N.E.2d at 1287.

[7] Based on the foregoing analysis, we conclude that relator was not required to submit evidence that public confidence in the integrity and impartiality of the judiciary was, in fact, undermined. However, even if this type of proof were ***219** required, we find that relator has met the burden. Specifically, Moore, an attorney from Columbus with no apparent connection to Justice Resnick, saw the ad and wrote a letter of complaint to the Supreme Court. Moore testified about his reaction to the ad, and the only conclusion to be drawn from his testimony is that he felt the ad was demeaning both to lawyers and the judiciary. Accordingly, we find respondent's second proposition of law to be without merit.

III

[8] In her third proposition of law, Judge Harper contends that Canons 7B(1)(a) and 2A are overbroad facially and as applied, and are too vague to have reasonably informed her of what speech or conduct was precluded. In support of this proposition, Judge Harper makes several additional points: (1) the language of the Canons in question is hortatory or advisory only, in view of the use of the words "should," rather than "shall"; (2) the state's interest in protecting the integrity of the judiciary is insufficient to impose

restrictions on the right of free speech; (3) under existing law, she can be disciplined only if the statements in question are false; and (4) the Canons are overbroad, both facially, and as applied. Each of these arguments will be addressed separately.

First, with regard to the issue of the mandatory nature of the Canons, we note that the preface of the Canons indicates that they "establish mandatory standards unless otherwise indicated." In this context, it is noteworthy that all the Canons use the term "should" except Canon 4, which uses the term "may." We also note that this court **1261 has consistently applied the Canons in question to the conduct of judges, which illustrates that the Canons are felt to be binding on the conduct and speech of judges. See, e.g., Campbell, 68 Ohio St.3d 7, 623 N.E.2d 24 (finding violation of Canon 2A, among others). In that case, the court made the following comment:

"The Code of Professional Responsibility and the Code of Judicial Conduct serve many purposes. Foremost among them are to ensure a legal system of the highest caliber and to instill and maintain public confidence in that system." 68 Ohio St.3d at 11, 623 N.E.2d at 27.

Additionally, in a case decided shortly after the Canons of Judicial Ethics were adopted in 1954, the Supreme Court noted that it had declared the Canons " ' * * * binding upon all members admitted to

practice law in the state of Ohio.' " Mahoning Cty. Bar Assn. v. Franko (1958), 168 Ohio St. 17, 21, 5 O.O.2d 282, 284, 151 N.E.2d 17, 21, certiorari denied (1959), 358 U.S. 932, 79 S.Ct. 312, 3 L.Ed.2d 305. The Supreme Court then commented:

"So much has been said and written about the honor, dignity, duties, responsibilities and standard of conduct generally expected of the legal profession that to expound thereon here would only be to repeat that which has already been well ***220** said many times. The fact remains, however, that a person who attains the honor and dignity of being a member of the legal profession necessarily renders himself subject to the duties and responsibilities thereof." 168 Ohio St. at 22, 5 O.O.2d at 285, 151 N.E.2d at 22. The court further made this observation:

"It follows that the requirement by the Supreme Court of Ohio that attorneys who are judges shall adhere to a specialized code of ethics, i.e., the Canons of Judicial Ethics, is in accord with the legislative intent that the judges of this state shall be persons who must adhere to the highest possible standard of ethical conduct." (Emphasis in original.) 168 Ohio St. at 23, 5 O.O.2d at 285, 151 N.E.2d at 23. See, also, Cuyahoga Cty. Bd. of Mental Retardation v. Assn. of Cuyahoga Cty. Teachers of Trainable Retarded (1975), 47 Ohio App.2d 28, 1 O.O.3d 168, 351 N.E.2d 777 (concluding that use of term "should" in

Code of Judicial Conduct means that the conduct is mandatory).

In Cuyahoga Cty. Bd. of Mental Retardation, Chief Justice Leo Jackson of the Cuyahoga County Court of Appeals noted:

"In examining the Code of Judicial Conduct it is apparent that while the permissible guidelines are indicated by the use of the word 'may' the mandatory portions are set forth by the use of the word 'should.' This is entirely consistent with the plain meaning of a word which expresses an obligation or duty. See Black's Law Dictionary (4th ed. 1968); Webster's New World Dictionary (1963)." 47 Ohio App.2d at 33, 1 O.O.3d at 171, 351 N.E.2d at 782.

[9] We therefore find that all of the Judicial Canons in the Code of Judicial Conduct, except Canon 4, establish mandatory standards of conduct for Ohio judges.

Having determined that the Canons are binding on judges, the next question is whether they impermissibly infringe on rights protected by the First Amendment, and whether they are constitutionally deficient in failing to provide fair notice of prohibited conduct to persons subject to their purview. Intertwined with these matters is the issue of whether only false statements can be the subject of discipline. Our analysis of the Canons and the relevant constitutional principles and authorities

has persuaded us that Canon 2A and 7B(1)(a), as well as their application in this case, withstand scrutiny.

The wording of Canon 2A is set forth above, and requires that judges conduct themselves at all times in a manner promoting public confidence in the integrity and impartiality of the judiciary. In addition, Canon 7B(1)(a) states:

"An incumbent judge, or a candidate for judicial office: (a) should maintain the dignity appropriate to judicial office."

Specifically, respondent argues that these Canons are overbroad and vague, both facially and as applied to her in this case, because they seek to punish *221 constitutionally protected speech, including true statements that **1262 the board viewed as reflecting adversely on the character of Ohio's judiciary.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. Rockford (1972), 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222, 227.

[10] Vague laws may also trap the

innocent by not providing fair warning. Papachristou v. Jacksonville (1972), 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110. Thus, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. Coates v. Cincinnati (1971), 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214; Gregory v. Chicago (1969), 394 U.S. 111, 117-118, 89 S.Ct. 946, 950, 22 L.Ed.2d 134, 139- 140 (Black and Douglas, JJ., concurring). A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. See Edwards v. South Carolina (1963), 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697.

In view of the imprecision of language, we can never expect complete certainty from its use. It will always be true that fertile legal "imagination can conjure up hypothetical cases in which the meaning of * * * [disputed] terms will be in nice question." Am. Communications Assn. v. Douds (1950), 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925, 951.

[11] When the vice of a statute is its vagueness, the litigant asserting the vagueness defense must demonstrate that the statute in question is vague as applied to the litigant's conduct without regard to its potentially vague application to others. Parker v. Levy (1974), 417 U.S. 733, 94 S.Ct. 2547, 41

L.Ed.2d 439. A perfectly vague statute is one which provides "[no] ascertainable standard for inclusion and exclusion" and thus is vague in all its applications. Smith v. Goguen (1974), 415 U.S. 566, 578, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605, 615. For example, the ordinance in Coates made it illegal for "three or more persons to assemble * * * on any of the sidewalks * * * and there conduct themselves in a manner annoying to persons passing by." 402 U.S. at 611, 91 S.Ct. at 1686-1687, 29 L.Ed.2d at 216, fn. 1. The "annoying" criterion is not vague merely in the sense that it is "an imprecise but comprehensible normative standard"; instead, it specifies no standard at all because one may never know in advance what "annoys some people [but] does not annoy others." 402 U.S. at 614, 91 S.Ct. at 1688, 29 L.Ed.2d at 217. As a matter of due process, a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its ***222** meaning and differ as to its application." Connally v. Gen. Constr. Co. (1926), 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328.

[12] In the First Amendment area, the objectionable aspects of vagueness need not depend upon the absence of fair notice, for the First Amendment's demand for specificity is also a product of the concern for a statute's chilling effect. "Those * * * sensitive to the perils posed by * * * indefinite language, avoid the risk * * * only by restricting their conduct to that which is unquestionably

safe. Free speech may not be so inhibited." Baggett v. Bullitt (1964), 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377, 385-386. As a consequence, the Supreme Court requires more specificity of a statute potentially applicable to expression sheltered by the First Amendment than in other contexts. Smith, 415 U.S. at 573, 94 S.Ct. at 1247, 39 L.Ed.2d at 612.

In the area of vagueness, we find instructive the analytical framework set forth in Parker. Parker involved, among other things, a challenge to the constitutionality of a regulation that punished commissioned officers for "conduct unbecoming an officer and a gentleman." 417 U.S. at 738, 94 S.Ct. at 2553, 41 L.Ed.2d at 447. Among the statements made were comments that Special Forces personnel were "liars and thieves," **1263 "killers of peasants," and "murderers of women and children." 417 U.S. at 739, 94 S.Ct. at 2553, 41 L.Ed.2d at 448, fn. 6.

The vagueness challenge in Parker is similar to Judge Harper's contention that the word "dignity" in Canon 7B(1)(a) and the content of the other Canons at issue in this case are too vague to furnish any appropriate means of guiding her conduct, thereby leaving silence as the only safe response. In Parker, the Supreme Court rejected this argument, based on several considerations. First, the court focused on the fact that the military was a " 'specialized community governed by a separate discipline from that of the

civilian.' " (Citation omitted.) 417 U.S. at 744, 94 S.Ct. at 2556, 41 L.Ed.2d at 451. Next, the court emphasized the military's development of customs and usages that imparted meaning to the "seemingly imprecise" standards. 417 U.S. at 746-747, 94 S.Ct. at 2556, 41 L.Ed.2d at 452. Another pertinent distinction was the regulation of broad aspects of life unregulated in the civilian area, accompanied by sanctions "more akin to administrative or civil sanctions than to civilian criminal ones." 417 U.S. at 751, 94 S.Ct. at 2559, 41 L.Ed.2d at 455.

After making these observations, the Supreme Court concluded the provisions in the Uniform Code of Military Justice were not void for vagueness, given prior constructions that had narrowed their meaning. 417 U.S. at 753-754, 94 S.Ct. at 2560-2561, 41 L.Ed.2d at 456. The court also commented that "further content may be supplied even in these areas by less formalized custom and usage." 417 U.S. at 754, 94 S.Ct. at 2561, 41 L.Ed.2d at 457. Subsequent lower court decisions have applied Parker 's reasoning in nonmilitary contexts. See Davis v. ***223** Williams (C.A.5, 1980), 617 F.2d 1100, certiorari denied (1980), 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 160 (upholding constitutionality of fire department regulation prohibiting conduct prejudicial to good order), and Vorbeck v. Schnicker (C.A.8, 1981), 660 F.2d 1260, certiorari denied (1982), 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (declining jurisdiction because of lack

of actual case and controversy, while indicating that police regulations, like military regulations, are generally cast in broad terms). But, cf., Bence v. Breier (C.A.7, 1974), 501 F.2d 1185 certiorari denied (1975), 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821.

In Davis, the court relied on both the Parker decision and Arnett v. Kennedy (1974), 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (upholding the constitutionality of civil service regulation allowing removal or suspension for "such cause as will promote the efficiency of the service"). In Arnett, the Supreme Court had previously emphasized:

" 'The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.' " (Citation omitted.) 416 U.S. at 159-160, 94 S.Ct. at 1647, 40 L.Ed.2d at 36.

[13] Taking the above authorities into account, we find nothing unfair in the imposition of sanctions for violation of either Canon 7B(1)(a) or 2A. First and foremost, fair warning of the prohibited conduct existed in the form of an interpretative board opinion and preexisting case law cited in the

opinion. Specifically, the board issued an advisory opinion in 1989 in response to the following question:

"How much negative criticism of an incumbent judge is permissible before such comments infringe on the dignity appropriate to that judicial office?" 1989 Ohio Bd. Commrs. on Grievances and Discipline, Op. 89-15. In response, the board commented:

"The threshold test to apply is whether the statements regarding an opponent are indeed truthful. * * * Once this is satisfied, there is a further requirement that the candidate must maintain the dignity appropriate to the office being sought. * * * This standard is not a precise one to apply; instead, it requires each candidate to exercise his or her own personal and professional judgment as to the implication and effect of the proposed criticisms." Id. at 5.

The board then stated:

**1264 "Some criticism of an opponent may be justifiable, as the Washington Supreme Court has held: '[a] candidate for judicial office has a right to challenge an incumbent judge's ability, decisions and judicial conduct, but it must be done *224 fairly, accurately and upon facts, not false representations.' In re Donahue [(1978), 90 Wash.2d 173, 180], 580 P.2d 1093, 1097 [sic, Donohoe].

"Furthermore, one commentator has stated

that '[i]f running for judicial office, a lawyer may criticize an incumbent judge who is his opponent--but the criticism must be well founded, on a high plane, factual[,] and not personal.' R. Wise, Legal Ethics 21 (1966)." Id.

Additionally, like the military, fire and police departments, and civil service, the judiciary is a specialized community governed by a specific discipline and body of rules. Further, sanctions like public reprimands, that are applied for violation of the Canons of Judicial Ethics, are more civil or administrative than criminal. Custom and usage also aid in informing attorneys and judges of appropriate conduct, as is revealed through the Supreme Court's observation many years ago about the knowledge of permissible conduct an experienced attorney would possess. In re Thatcher (1909), 80 Ohio St. 492, 669, 89 N.E. 39, 88.

Accordingly, because Canons 2A and 7B(1)(a) provided reasonable opportunity for regulated persons to know what conduct was prohibited, and were also explicit enough to prevent arbitrary enforcement, they are not subject to attack under the vagueness doctrine.

[14] Next, with respect to overbreadth, such a challenge is predicated on the proposition that a "clear and precise enactment may * * * be 'overbroad' if in its reach it prohibits constitutionally protected conduct." Grayned, 408 U.S. at 114, 92 S.Ct. at 2302, 33 L.Ed.2d at 231.

In addressing an overbreadth challenge, the "crucial question * * * is whether the [legislation] sweeps within its prohibitions what may not be punished under the First * * * Amendment[ ]." 408 U.S. at 114-115, 92 S.Ct. at 2302, 33 L.Ed.2d at 231.

[15] Overbreadth is avoided if the regulation or legislation in question may be narrowed by reasonable construction, including interpretation by the agency responsible for enforcement. See United States Civ. Serv. Comm. v. Natl. Assn. of Letter Carriers (1973), 413 U.S. 548, 580, 93 S.Ct. 2880, 2897-2898, 37 L.Ed.2d 796, 817 (rejecting overbreadth attack on prohibition against employees taking active part in political campaign, based on, among other things, construction of statute by civil service commission and availability of procedure by which employee might obtain advice from the commission about the meaning of the law). See, also, e.g., Stretton v. Disciplinary Bd. of Supreme Court of Pennsylvania (C.A.3, 1991), 944 F.2d 137 (interpreting Canon 7 narrowly and rejecting overbreadth challenge).

The beginning focus for analysis in the present context, then, is Ohio law and any relevant interpretations of the board of commissioners. At the outset, we observe that many years ago, the Supreme Court approved the right of attorneys to criticize the judgments and conduct of judges during an election campaign, but ***225** emphasized that the criticism must be done in a decent and respectful

manner. See In re Thatcher (disbarring attorney for comments made about judge during reelection campaign). In Thatcher, the court rejected the attorney's free-speech claims, commenting that "[a]n attorney of more than twenty years' standing at the bar must be presumed to know the difference between respectful, fair, and candid criticism, and scandalous abuse of the courts * * *." Id. at 669, 89 N.E. at 88.

The comments in Thatcher were obviously more egregious than those in the present case, but on the other hand, disbarment, not simply a reprimand, was at issue. We do note that among the objectionable statements in Thatcher were allegations to the effect that the judge would decide cases in favor of persons who had financed him politically. See id. at 571-576, 89 N.E. at 69-70.

At the time Thatcher was decided, Ohio did not have canons of judicial ethics, but they were subsequently adopted in 1954. In addition, Gov.Bar R. V(2)(C) has been **1265 adopted, and affords interested parties an opportunity to obtain advice from the board about proposed conduct. In this vein, the board issued the advisory opinion previously cited, which provided guidance for candidates considering criticizing opponents in an election campaign.

[16][17] We recognize that a speaker cannot be punished because of his or her viewpoint or message unless the restriction is necessary to promote a

compelling government interest. Simon & Schuster, Inc. v. New York Crime Victims Bd. (1991), 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476. Content- based restrictions receive a high level of judicial scrutiny and will be upheld only if they are narrowly drawn to achieve "an important or substantial governmental interest [that] * * * is unrelated to the suppression of free expression." United States v. O'Brien (1968), 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680.

[18][19] Although respondent agrees that the state has a compelling interest in protecting public confidence in the integrity of the judiciary, she is not willing to concede that this compelling interest overrides her right to publish truthful criticism of a Supreme Court justice. She argues that to the extent the Canons are interpreted to prevent truthful criticism of the judiciary, they are unconstitutionally overbroad. We wholeheartedly agree, but also conclude that the Canons do not prohibit truthful criticism, so long as the criticism is done fairly, accurately, and upon facts, not false representations. Accordingly, given the construction that truthful criticism of the judiciary in a dignified manner is not sanctionable, the Canons are not overbroad.

While reaching this conclusion adverse to respondent, we also stress that criticism of the judiciary has an important function in our society. For example, in Bridges v. California (1941),

314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, the United States Supreme Court reversed the contempt convictions of a newspaper ***226** editor and a labor leader for their remarks in editorials commenting on cases pending in a state court. The court held the convictions violated the First Amendment, even though the substantive evils asserted to support the contempt convictions were disrespect for the judiciary and disorderly and unfair administration of justice. While we recognize that Bridges is not directly on point, we do find the following language from the opinion worth emphasizing:

"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind * * * on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." 314 U.S. at 270-271, 62 S.Ct. at 197, 86 L.Ed. at 207. Again, the Canons do not, and should not preclude criticism of the judiciary. However, that criticism must be tempered in the manner outlined above.

Pertinent in this context is the case of In re Kaiser (1988), 111 Wash.2d 275, 759 P.2d 392, in which the Washington Supreme Court held that Canons 1, 2(A) and 7B(1)(a) were violated when an incumbent judge made the following campaign

statements:

"JUDGE KAISER IS TOUGH ON DRUNK DRIVING ... Will Roarty, the opponent, receives the majority of his financial support from drunk driving defense attorneys, whose primary interests are getting their clients off. * * *

"My opponent, Will Roarty, has received the majority of his financial contributions from drunk driving defense attorneys. This is the only group involved with Northeast District Court not supporting my reelection.

"The point is clear, I am a tough, no-nonsense judge and this group of attorneys wants to prevent my re-election." (Emphasis omitted in part.) Id. at 278, 759 P.2d at 394-395.

The court found these statements violative of the Canons because the statements suggested that justice is for sale and that certain defendants are not entitled to a fair trial. The court further found that the statements regarding contributions by DWI defense attorneys violated the Canons by calling into **1266 question the integrity and impartiality of the judiciary. Specifically, the court stated:

"Judge Kaiser suggested that, if elected, Roarty would not fairly and impartially apply the law to DWI defendants. He suggested that certain attorneys could and did buy favorable treatment for their clients, a class of

defendants for whom there is little public sympathy. He suggested there is something improper about attorneys contributing to a judicial campaign when, of course, such contributions ***227** are entirely proper." Id. at 282, 759 P.2d at 396. The court in Kaiser also found that the Canons in question as applied to Kaiser's statement were constitutionally valid because the statements had a direct detrimental effect on the compelling state interest of protecting the integrity of the judiciary. Id. at 289, 759 P.2d at 400.

Additionally, in Berger v. Supreme Court of Ohio (S.D.Ohio 1984), 598 F.Supp. 69, the federal district court rejected a constitutional challenge to Canon 7B(1)(c), which at that time restricted judges from announcing views on disputed legal issues, pledging or promising conduct in office, and making misrepresentations. The court first found a compelling state interest in regulating this area, stating:

"Plaintiff does not dispute that the state has a compelling interest in assuring that its elected judges are protected from untruthful criticism and that judicial campaigns are run in a manner so as not to damage the actual and perceived integrity of state judges and the bar; hence, the provision against misrepresentation. Additionally: [']Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political

issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.[']" (Emphasis added.) Id. at 75, quoting Morial v. Louisiana Judiciary Comm. (C.A.5, 1977), 565 F.2d 295, 302.

The court then denied a request for preliminary injunction, finding that the regulation was necessary to achieve a compelling interest, but was not so unclear as to be attacked as void for vagueness. Id.

"[T]here is practically universal agreement that a major purpose of * * * [the First] Amendment was to protect the free discussion of governmental affairs, * * * of course * * * [including] discussions of candidates. Mills v. Alabama (1966), 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484, 488." "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." McIntyre v. Ohio Elections Comm. (1995), 514 U.S. ----, ----, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426, 439-440.

[20] We agree with the board that the record establishes that members of the Ohio Academy of Trial Lawyers as well as political action committees associated with the academy contributed in excess of

$300,000 to Justice Resnick's 1994 campaign. There was nothing wrong with the respondent's informing the public that Justice Resnick received substantial contributions from this special interest group. Those who wished to go to the trouble could have examined Justice Resnick's campaign finance report filed with the Secretary of State and come to the same conclusion.

***228** [21] [22] [23] Further, the statement in the advertisement that "[T]his small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees" is an expression of opinion by Judge Harper. Opinions are protected under the First Amendment. "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805. [FN3] By the same token, however, First Amendment protection does not adhere to statements of opinion that imply ****1267** false assertions of fact. Milkovich v. Lorain Journal Co. (1990), 497 U.S. 1, 18, 110 S.Ct. 2695, 2705, 111 L.Ed.2d 1, 17. As will be noted below, some of the statements in the ad implied false assertions of fact and were, therefore, inappropriate.

FN3. Parenthetically, we note that we also agree with the board that Judge Harper's opinion did not violate

Canon 7B(1)(a), which prohibits candidates from expressing an opinion on a disputed legal issue.

In view of the preceding analysis, which has revealed that Canons 2A and 7B(1)(a) are neither overbroad nor void for vagueness, we reject Judge Harper's third proposition.

IV

[24] As a final argument, respondent contends that the board improperly focused on the display of an obviously facetious check in reaching its recommendation for a public reprimand. We share the concerns expressed by the board about the video, which shows a check from the law firm of "Sue & Sue," and signed by "Cheatem Good." The check was pictured above a photograph of Justice Resnick. As was previously noted, the board concluded that the following reasonable conclusion followed from the totality of the ad:

"(1) Certain lawyers are dishonest.

"(2) One justice is associated with those lawyers.

"(3) There is something improper about lawyers contributing to a judicial campaign.

"(4) A justice appears to be the captive of one class of litigants, group of lawyers, or special interest."

Additionally, the board also concluded that these implications were either untrue or that Judge Harper had no information to support the innuendoes. We agree with this analysis. While the First Amendment allows for " 'rhetorical hyperbole,' " the comments in the advertisement were reasonably susceptible of ***229** an improper meaning and were not merely loose or figurative language. Milkovich, 497 U.S. at 17, 110 S.Ct. at 2705, 111 L.Ed.2d at 16-17.

The United States Supreme Court has recognized constitutional limits on the type of speech which may be the subject of state "defamation" actions. For example, in Greenbelt Cooperative Publishing Assn. v. Bresler (1970), 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, the court held that statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, thus assuring that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation," Milkovich, 497 U.S. at 20, 110 S.Ct. at 2706, 111 L.Ed.2d at 19. Therefore, in Greenbelt, the court reasoned that "the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [an opponent's] negotiating position extremely unreasonable." 398 U.S. at 14, 90 S.Ct. at 1542, 26 L.Ed.2d at 15. Likewise, in Hustler Magazine, Inc. v. Falwell (1988),

485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41, 48, the Supreme Court held that the First Amendment precluded recovery under a state's emotional distress action for an ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved."

Applying these authorities to the present case, a viewer of respondent's political advertisement would not seriously believe that a law firm named "Sue & Sue" exists, nor would he or she believe there is actually a lawyer named "Cheatem Good." A reasonable member of the public could, nonetheless, have concluded from the advertisement that lawyers representing plaintiffs' interests are dishonest and that these dishonest lawyers desired Justice Resnick's re-election. However, contrary to the inferences in the ad, lawyers representing plaintiffs' interests provide a valuable contribution to the public. To the extent the advertisement suggested dishonest lawyers might find comfort in Justice Resnick's reelection, it undermined public confidence in the integrity and impartiality of the judiciary. Furthermore, by authorizing the advertisement, respondent failed to maintain the dignity appropriate to her judicial office.

We also agree with the board that the advertisement suggested there was something improper in lawyers' contributing to a judicial campaign. Again, this inaccurate representation

also undermined public confidence **1268 in the integrity and impartiality of the judiciary.

Therefore, we find that by approving this campaign advertisement, respondent violated Canons 2A and 7B(1)(a). Accordingly, we must publicly reprimand the respondent. We do so, however, with great reluctance in light of the many years of distinguished service Judge Harper has given the citizens of this state.

Judgment accordingly.

*230 HILDEBRANDT, WOLFF, HADLEY, PETER B. ABELE, WILLIAM B. HOFFMAN, O'NEILL, BAIRD, BOWMAN and FORD, JJ., concur.

WALSH, J., concurs separately.

JAMES A. BROGAN, C.J., of the Ohio Courts of Appeals Judges Association, and of the Second Appellate District.

LEE H. HILDEBRANDT, Jr., J., of the First Appellate District.

WILLIAM H. WOLFF, Jr., J., of the Second Appellate District.

RONALD E. HADLEY, J., of the Third Appellate District.

PETER B. ABELE, J., of the Fourth Appellate District.

WILLIAM B. HOFFMAN, J., of the Fifth Appellate District.

JOSEPH E. O'NEILL, J., of the Seventh Appellate District.

WILLIAM R. BAIRD, J., of the Ninth Appellate District.

DONNA BOWMAN, J., of the Tenth Appellate District.

DONALD R. FORD, J., of the Eleventh Appellate District.

JAMES E. WALSH, J., of the Twelfth Appellate District.

WALSH, Judge, concurring.

Having come to the conclusion that we, as judges, are accountable for what we approve to be done as much as we are for what we do, I, too, reluctantly join in the majority decision in this case. My reluctance stems from the circumstances of this case.

Judge Harper first viewed the subject television advertisement eight days prior to the election and was thus not given much time to reflect upon the advertisement prior to authorizing its airing. Eight days seems like a long time until one considers the lag time involved in making up a new television advertisement, distributing it, showing it, and the nearness of the upcoming election day to October 31, 1994, when Judge Harper first saw the advertisement. Additionally, funds had already been expended to make the subject television advertisement.

When Ohio Republican Party Chairman Robert Bennett invited Judge Harper to his office in Columbus to view the television commercial for the first time, the press of these circumstances had to be in the front of her mind. Also to be considered by her, after seeing it, was the wisdom of confronting Bennett concerning the poor judgment that went into designing this commercial, and whether she wanted, at this stage of the campaign, so to disagree with the state party chairman who had put her into this position.

***231** By her failure to reject the advertisement, we are finding that Judge Harper violated Canons 2A and 7B(1)(a). But, this didn't happen in a vacuum. For that I am saddened by the resulting blemish on her otherwise successful career.

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Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

No. 96-1612

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

SARA J. HARPER,
Petitioner,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,
Respondent.

On Petition for a Writ of Certiorari
to the Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In many respects, we agree with petitioner's statement of the case. A few clarifications, however, are in order. As an initial matter, petitioner lists respondents in her caption as the "Office of the Disciplinary Counsel, The Supreme Court of Ohio, et al." Below the case was properly captioned as "In re Complaint Against Judge Harper," and this response is filed on behalf of the only appropriate respondent, the Office of the Disciplinary Counsel.

Next, petitioner suggests that she was punished by the court below for making truthful statements. She was not, and her petition therefore misstates the issue presented. The judgment indicates that she was reprimanded for making statements that were "untrue" (Petition at 107) and "inaccurate" (Petition at 108), *not* for "truthful criticism" of the judiciary, which is not only permissible, but according to the lower court also plays "an important function in our society." (Petition at 100).

Petitioner likewise fails to explain several critical facts underlying this case: *why* in other words she was reprimanded by the Ohio Supreme Court. While running for a seat on the Ohio Supreme Court, petitioner approved a television advertisement that was broadcast just days before the election in November 1994. The advertisement's narrator stated:

> On the Ohio Supreme Court, one Justice has a problem. It's money. Most of Resnick's money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over $300,000.00 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions

> in fees. It's time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, 20 years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.

(Petition at 72.) While the narrator spoke, a photograph of Judge Harper's opponent, Justice Resnick, was featured with the phrase "Justice Has Problem." Then the words ". . . It's Money!" appeared. Following that, Justice Resnick's picture was shown with the caption "Resnick's Money." Then a large check was displayed with the words "Trial Lawyers" and "Sue & Sue" on the top left-hand corner of the check. In the portion of the check where one would normally see the dollar amount, the figure "Over $300,000.00" was shown. The check was signed by "Cheatem Good." Next the ad displayed the words "Resnick's Liberal Rulings Help Lawyers Collect Millions." The ad also pictured individual lawyers, next to which appeared attorney advertisements making various claims, including the following: "Experienced in recovering large money awards," "NO FEE UNLESS YOU COLLECT," "No Fee if No Recovery." (Petition at 72-73.)

The Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court found that Judge Harper's advertisement raised the following impermissible implications:

> (1) Certain lawyers are dishonest; (2) One justice is associated with those lawyers; (3) There is something improper about lawyers contributing to a judicial campaign; and (4) A justice appears to be the captive of one class of litigants, group of lawyers, or special interest.

(Petition at 106.)

The Ohio Supreme Court upheld these findings, and concluded that Judge Harper had violated two Canons of Ohio's Code of Judicial Ethics: she failed to conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and she failed to maintain the dignity appropriate to judicial office. (Petition at 109.) As a result, she received a public reprimand-- the mildest sanction for Ohio judges or attorneys found guilty of misconduct. *See* S. Ct. Rules for the Govt. of the Bar of Ohio, Rule V, § 6(B).

REASONS FOR DENYING THE WRIT

The petition should be denied for three independent reasons. First, and most importantly, no lower court split of authority is alleged. Nor does one exist on the question presented. Second, much of the petition does not even raise a federal question subject to further review; it concerns an interpretation of state law. Finally, the Ohio Supreme Court properly applied its own ethical canons, together with established First Amendment standards, in punishing petitioner's false and misleading speech while permitting her truthful statements and opinions to stand.

A. No Lower Court Split of Authority Exists.

Petitioner conspicuously fails to allege any split of authority among the state supreme courts or lower federal courts on the issues presented. The petition thus fails to establish any ongoing legal problem demanding the Court's review.

Nor is this application of First Amendment law unique. Other state courts have permissibly reprimanded judges, judicial candidates and attorneys for making false and misleading statements attacking the integrity of the judiciary

and the bar. *See In re Disciplinary Proceeding Against Kaiser*, 111 Wash. 2d 275, 759 P.2d 392 (Wash. 1988) (ordering public censure for judge who violated state judicial canons by suggesting that DWI defense attorneys could obtain favorable treatment for their clients from the judges's election opponent); *In re Johnson*, 240 Kan. 334, 729 P.2d 1175 (1986) (ordering public censure for county attorney who made false statements about his opponent's positions on crime and other issues during reelection campaign); *In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984) (ordering public censure for judicial candidate who suggested that the State could not receive a fair trial in the incumbent judge's courtroom).

In *Kaiser,* in fact, the Washington Supreme Court, like the lower court here, emphasized that truthful speech was not the object of its censure order. *See Kaiser*, 111 Wash. 2d at 289-91, 759 P.2d at 400-01 (stating that judge had every right to describe himself as "tough [and] no nonsense," and affirming judge's right to publicize the contributions his opponent had received from DWI defense attorneys). Rather, the challenged canons in this case, as in *Kaiser*, bar what has long been unprotected not only in the narrow field of judicial campaign speech, but also in the broader context of defamation or other First Amendment-related areas of the law: false and misleading speech. No conflict on this issue exists.

B. The Ohio Supreme Court's Interpretation of Its Judicial Canons Does Not Present A Federal Question.

Much of the petition focuses on the meaning of words in Ohio's Code of Judicial Conduct. In particular, petitioner contends that the Code's use of the word "should" fails to impose any obligation to abide by the Code's requirements.

Yet the meaning of these words is quintessentially a matter of state law -- one which in fact had already been resolved when petitioner approved this advertisement. *See Mahoning Cty. Bar Ass'n. v. Franko*, 168 Ohio St. 17, 23 (1958), *cert. denied*, 358 U.S. 932 (1959); *Cuyahoga Cty. Bd. of Mental Retardation v. Ass'n. of Cuyahoga Cty. Teachers*, 47 Ohio App. 2d 28, 33 (8th Dist. 1975) (holding that "the mandatory portions [of Ohio's Code of Judicial Conduct] are set forth by the use of the word 'should'"). At any rate, the important point is that the question concerns an issue of State law.

C. The Ohio Supreme Court Correctly Punished Speech That It Found False and Misleading.

Contrary to petitioner's suggestion, the Ohio Supreme Court carefully noted that it was not punishing her truthful statements or her opinions, but rather the false assertions of fact and the inaccurate representations shown in her advertisement. As the lower court made clear, "the Canons do not prohibit truthful criticism, so long as the criticism is done fairly, accurately, and upon facts, not false representations." (Petition at 100.) "By the same token, however, First Amendment protection does not adhere to statements of opinion that imply false assertions of fact." (Petition at 105.)

Petitioner also raises overbreadth and vagueness challenges to the Ohio judicial canons. Each is defective. The mere fact that one can conceive of some impermissible applications of a statute, as petitioner attempts to do here, does not suffice to show overbreadth. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). As the court below correctly observed, the problem of overbreadth may be avoided if a state court or enforcement agency has narrowed the regulation by reasonable construction. *See*

United States Civ. Serv. Comm'n. v National Ass'n. of Letter Carriers, 413 U.S. 548, 580 (1973).

Truthful criticism of the judiciary simply is not sanctionable under Ohio's judicial canons, as the court below noted, and those canons therefore fall well within this Court's own First Amendment jurisprudence. Nor can petitioner point to any incidents of overbroad application by Ohio courts of the canons under which she was reprimanded. They have been interpreted to permit fair, accurate and truthful criticism of the judiciary. (Petition at 100.)

No less mistaken is the vagueness challenge. Petitioner had fair warning that her conduct was prohibited in view of Ohio's earlier interpretations of its disciplinary rules, which clearly gave notice that she enjoyed no privilege falsely to represent either Justice Resnick's ties to one class of supporters or the legality of those supporters' actions. In Ohio, moreover, parties are provided by court rule with the opportunity to obtain advisory opinions about proposed conduct from attorney disciplinary officials, and petitioner certainly could have pursued that route had she been uncertain about the propriety of running the ad. *See* S. Ct. Rules for the Govt. of the Bar of Ohio, Rule V, § 2(C).

Prior decisions of this Court likewise put her on notice that the First Amendment's protections do not extend to opinions that imply false assertions of fact. *See Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard for the truth do not enjoy constitutional protection"); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (finding no separate constitutional protection for a statement solely because it might be labeled as an opinion, and permitting libel suit where statement could be read to imply an assertion that could be proved true or false);

Masson v. New Yorker Magazine, 501 U.S. 496, 516-17 (1991) (holding that defamation can occur when the speaker's words change the meaning of otherwise constitutionally protected speech).

As the lower court noted, moreover, this Court has previously rejected a vagueness challenge to the constitutionality of a regulation that punished commissioned officers for "conduct unbecoming an officer and a gentleman." *See Parker v. Levy*, 417 U.S. 733, 738 (1974). In *Parker*, the Court focused on the fact that the military was a "specialized community governed by a separate discipline from that of the civilian." 417 U.S. at 744. The Court also emphasized that the military had developed customs and usages that imparted meaning to its codes of conduct. 417 U.S. at 746-47. Given the legal community's equally specialized disciplinary mechanisms, and the public's appropriate expectations concerning judicial integrity, there is every reason for the public and its courts to demand that judges likewise adhere to a particular code of conduct.

While the Ohio Supreme Court found nothing wrong with Petitioner's effort to inform the public that Justice Resnick received substantial contributions from the Ohio Academy of Trial Lawyers, *see* Petition at 105 -- a truthful statement -- and imposed no penalty for the ad's suggestions that Justice Resnick was liberal and that plaintiffs' lawyers sought her reelection, *see Id.* -- both expressions of opinion -- it found that her ad also included several false assertions of fact, which went beyond protected "rhetorical hyperbole." *Milkovich*, 497 U.S. at 17. The words "Cheatem Good" on a check from "Sue & Sue" while the words "Resnick's Money" were shown on the screen, together with spoken words and a visual image indicating that Justice Resnick had a "problem [with] money," could well lead a reasonable person to conclude that Justice Resnick was improperly

receiving money from attorneys, and that lawyers supporting her reelection were dishonest. (Petition at 108.) The advertisement improperly conveyed these false and misleading messages, and it was those false factual assertions that led to her reprimand.

The lower courts have long recognized a compelling state interest in judicial integrity. *See Stretton v. Disciplinary Bd. of Supreme Court of Penn.*, 944 F.2d 137, 142 (3rd Cir. 1991); *Morial v. Judiciary Comm'n. of La.*, 565 F.2d 295, 302 (5th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1013 (1978); *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 75 (S.D. Ohio 1984). And, as this Court noted in *Cox v. Louisiana*, 379 U.S. 559, 565 (1965), "[a] State may also properly protect the judicial process from being misjudged in the minds of the public." Both the Code of Conduct for United States Judges and the ABA's Model Code of Judicial Conduct admonish judges to strive to maintain the integrity and independence of the judiciary, noting that "violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law." (Commentary to Canon One.)

Ohio's judicial canons, like those of many states and of the federal government, are designed to ensure that public confidence in the State's elected judiciary continues. The Ohio Supreme Court's carefully reasoned and balanced decision to allow petitioner's opinions and truthful criticisms to stand, but to impose its mildest sanction for petitioner's statements implying facts which were neither dignified nor accurate, permissibly advances these important goals.

CONCLUSION

For the foregoing reasons, we respectfully submit that the writ should be denied.

Respectfully submitted,
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